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In the Supreme Court of the United States

OCTOBER TERM 1981

A.W.I., INC. - Petitioner

VERSUS

AMERICAN INSURANCE CO. - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether an oil field specialty worker, injured on a vessel situated on inland navigable waters of the United States is covered by the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§901, *et seq.*, particularly §§902(3) and 903)).

(2) Whether injury on inland navigable waters, in and of itself, satisfied the dual "situs-status" test imposed by the 1972 Amendments to the LHWCA and enforced previously by this Court but ignored and rejected by the Court of Appeals in this case below.

(3) Whether workers who would have been covered by the LHWCA prior to the 1972 amendments are covered thereafter simply by virtue of the fact that they were covered before, whether or not they qualify under the "status test."

(4) The ultimate issue determinative between the parties to this application is whether or not the restriction against contribution or indemnity contained in Section 5(a) of the LHWCA (33 U.S.C. §905(a)) immunizes the respondent American and its assured, Aquatek from this third party demand by AWI, Inc.

PARTIES TO THE PROCEEDING

In addition to the parties appearing in the caption to this petition, claimant, Keith Boudreaux and Aquatek, Inc., his former employer, are parties to this action. The Director, Office of Workmens Compensation Programs, United States Department of Labor intervened amicus curiae in the Court of Appeals below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDINGS ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
STATUTE INVOLVED 2
STATEMENT OF THE CASE 3
JURISDICTION IN THE COURT OF THE FIRST INSTANCE 7
REASONS FOR GRANTING THE WRIT 7
CONCLUSION 21
CERTIFICATE OF SERVICE 22
APPENDIX A—The Panel Decision of the Court of Appeals A-1
APPENDIX B—The Opinion of the Court of Appeals, En Banc A-47

TABLE OF AUTHORITIES

CASES **PAGE**

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981) *Rehearing granted* 664 F.2d 480 (5th Cir. 1982), *Opinion on rehearing* 680 F.2d 1034 (5th Cir. 1982) 2

Caldwell v. Ogden Sea Transp., Inc.,
618 F.2d 1037 (4th Cir. 1980) 16

Churchill v. Perini North River Assoc.,
652 F.2d 255 (2d Cir. 1981), *Cert. granted*, Docket No. 81-897, __ U.S. __, 102 S.Ct. 1425 (1982) .. 16

Dore v. Link Belt, Co.,
391 F.2d 671 (5th Cir. 1968) 17

Dravo Corp. v. Banks,
567 F.2d 593 (3rd Cir. 1977) 15

Fusco v. Perini North River Assoc.,
601 F.2d 659 (2d Cir. 1979); *vacated and remanded*, 444 U.S. 1028, 100 S.Ct. 697 (1980); *on remand* 622 F.2d 1111 (2d Cir. 1980); *Cert. denied*, 449 U.S. 1131, 101 S.Ct. 953 (1981) 12, 13

Gilliam v. Wiley N. Jackson Co.,
659 F.2d 54 (5th Cir. 1981) 16

Graziano v. General Dynamics Corp.,
663 F.2d 340 (1st Cir. 1981) 15

Northeast Marine Terminals Co., Inc. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 8, 11, 15, 13

P. C. Pfeiffer Co. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1977) 11, 14, 13

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352, 89 S.Ct. 1835 (1969) 10, 17

Rodrigue v. Aetna Cas. & Sur. Co.,
395 F.2d 216 (5th Cir. 1968) 17

Thibodeaux v. Atlantic Richfield Co.,
580 F.2d 841 (5th Cir. 1978) *Cert. denied*, 442 U.S. 909, 99 S.Ct. 2820 (1979) 15, 16

Weyerhauser Co. v. Gilmore,
528 F.2d 957 (9th Cir. 1975), *Cert. denied*,
429 U.S. 868, 97 S.Ct. 179 (1976) 9, 12, 13

CONSTITUTION AND STATUTES

United States Constitution, Article III, Section 2 7
28 U.S.C. §1254(1) 2
28 U.S.C. §1333 7
33 U.S.C. §901, *et seq.* i
33 U.S.C. §902(3) ..... i, 2, 11
33 U.S.C. §903(a) 3, 11
33 U.S.C. §905(a) i
La. R.S. 22:658 4

OTHER AUTHORITIES

U.S. Code, Congressional & Administrative News,
4698, 4708 (1972) 10
U.S. Senate Report No. 1195, 92nd Congress,
Second Session (1972) (Page 13) 10

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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

A.W.I., Inc. petitions this court for a Writ of Certiorari to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit in this case. Petitioner here was the appellant in that Court, and was a defendant and third party plaintiff in the District Court.

OPINIONS BELOW

The original opinion of the panel of the Court of Appeals (Ap. A, infra, A-1) is reported at 664 F.2d 463 (5th Cir.

1981). Appended to the end of the opinion in the West Reporter is an order granting a rehearing en banc, 664 F.2d 480 (5th Cir. 1982). The opinion of the Court of Appeals, en banc (Ap. B, *infra*, A-47) is reported at 680 F.2d 1034 (5th Cir. 1982). There was no formal opinion by the district court in the dismissal of petitioner's third party demand.

JURISDICTION

The original opinion of the Court of Appeals was handed down on December 7, 1981. Rehearing was timely applied for, and was granted en banc on January 11, 1982. After argument en banc, the opinion on rehearing was handed down on July 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Sections 2(3) and 2(4) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§902(3) and 902(4)) provides in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker ...
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in while or in part, upon the navigable waters of the United States (including

> any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §903(a)) provides in pertinent part:

> Sec. 3.(a) Composition [sic] shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ...

STATEMENT OF THE CASE

The facts applicable to this case are stated in the appendix to the panel opinion (664 F.2d at 469). The case arose to the Court of Appeals on a judgment granting a motion for summary judgment, so there is no dispute as to the facts.

Plaintiff Boudreaux was a wireline hand employed by Aquatek, Inc. Aquatek was called out by Texaco, Inc. to perform wireline services aboard an inland workover barge owned and operated by AWI, Inc. There was no direct contractual relationship between AWI, Inc. and Aquatek. Aquatek was insured for its liability in the pre-

mises by American Insurance Co.

Boudreaux was injured in the course of the performance of this work. His accident occurred, as stated, on a barge workover rig owned by AWI, Inc., located in navigable waters in the territorial confines of the State of Louisiana. As a result of the accident and the injuries sustained, Boudreaux made claim for benefits under the Longshoremen & Harbor Workers Compensation Act, and these benefits were paid by American Insurance Co., as the insurer of Boudreaux's employer, Aquatek.

Subsequently, Boudreaux filed suit against AWI, Inc., alleging that his accident was the result of the fault on the part of the defendant. AWI, in turn, filed a third party demand for indemnity and contribution against plaintiff's employer, Aquatek, Inc. and its insurer, American Insurance Co. (under the Louisiana Direct Action Statute, La. R.S. 22:658). At about the same time, American intervened to recoup the payments previously made by it to the plaintiff and on his behalf.

Service was delayed on Aquatek, but American responded to the third party demand with a motion for summary dismissal of the third party demand, essentially contending that it and its assured were immune from any such demand under Section 5(a) of the LHWCA. The motion was resisted on the basis of the contention by the third party plaintiff that the LHWCA was inapplicable to the matter because of an absence of "status."

Wirelining is an oil field activity which involves the insertion of various tools in the well for the performance of various wells therein (removal of unwanted objects from the hole, insertion of control devices, perforation of the stem at different levels, etc.). It is a procedure which must be performed on all oil and gas production wells, regardless of whether these tasks are on land, over the water, or under platforms on the Outer Continental Shelf. Wirelining is not peculiar to wells located over the water.

The district court granted American's motion for summary judgment and, thereafter, made this action a final judgment under Rule 54(b) Federal Rules of Civil Procedure, and AWI appealed to the United States Court of Appeals for the Fifth Circuit.

After argument, and over one dissent, the panel of the Court of Appeals held that the juridical relationship between the claimant, Boudreaux, and his employer, Aquatek, was governed by the LHWCA, and affirmed the judgment of the district court dismissing the third party demand. The reasoning was that (1) there was no intention on the part of Congress to diminish coverage of the LHWCA by the passage of the 1972 amendments thereto; (2) claimant was doing work which was in keeping with the mission of the vessel, and therefore his work was maritime in nature as a result and (3) oil field service work (wirelining) was inherently maritime in character in that it bore a significant relationship to the maritime navigation and commerce, and therefore said work was covered by the

LHWCA as long as it was performed over the navigable waters of the United States.

The dissent focused on two points (1) that the decision was contrary to the decisions of each of the other maritime circuits on point, and (2) that the decision constituted judicial legislation in failing to follow the decisions of this Court which require the dual inquiry as to situs and status.

An application for rehearing was granted en banc. After argument, the panel decision was reaffirmed, although the emphasis shifted slightly. The decision on rehearing focuses principally on the conclusion that there was no manifest intention on the part of Congress to restrict coverage in the 1972 amendments and, since Boudreaux would have been covered prior to 1972, he is covered now. Justification for the decision is also drawn from the original conclusion that there is something maritime about each employment which is done over navigable waters, that is to say that, where the work is done over the water, there is coverage by the LHWCA regardless of the nature of the work.

The holding dictated the dismissal of the third party demand by the vessel owner, AWI, Inc. against American and Aquatek, the employer of the claimant.

JURISDICTION IN THE COURT OF THE FIRST INSTANCE

The jurisdiction of the District Court was invoked under the Constitution of the United States, Article III, Section 2, this being a case within the admiralty and maritime jurisdiction of the United States Courts. See also 28 U.S.C. §1333.

REASONS FOR GRANTING THE WRIT

The principal articulated major premise of the Court of Appeals decision is that where an accident and employment related injury occurs on navigable waters, there is coverage *ipso facto* under LHWCA, regardless of the nature of the work being performed at the time of the accident. This conclusion is reached from the proposition that (1) there was no intention on the part of Congress to restrict coverage then existing in any way (Boudreaux would have been covered prior to 1972) and (2) everything done, regardless of what it is, is maritime if it occurs over the water.

Almost as an aside, the Court of Appeals then finds that there would be coverage in any event, because oil field service work is inherently maritime, and "bears a significant relationship to maritime commerce and navigation."

As to these, the reasons for granting the writ are as follows:

(1) The principal premise in the Court of Appeals opinion admittedly (680 F.2d at 1036) reaches the question which was reserved by this Court in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 266 n. 25, 97 S.Ct. 2348, 2358 n. 25 (1977). The question should be settled by this Court.

(2) The principal basis for the decision in the Court below is in conflict with the decisions of this Court, at least by implication, and this variance should be corrected by this Court.

(3) The principal basis for the decision of the Court below is at variance with the decisions on point of the other circuits which have considered the question, and the conflict between the circuits should be considered by this Court.

(4) The secondary basis for the decision below (that there is something inherently maritime about wirelining) is contrary to the prior decisions by this Court. If it is not in conflict with prior decisions of this court, it represents an issue which this court should decide in the first instance.

(1) Argument on Point 1 - *The Question Should Be Resolved By The Supreme Court.*

The question posed in this case is that reserved specifically by this Court in *Caputo, supra.* See note 25, 432 U.S. at 266, 97 S.Ct. at 2358:

> 25. As the definition of "employee" makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two subcategories.
>
> This case also does not involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined. See *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (CA9), *cert denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976).

The Court of appeals in the case at bar has decided specifically that there was no restriction of coverage intended by the 1972 amendments to the LHWCA. It is undisputed by the petitioner herein that, prior to 1972, Boudreaux would have been covered by the LHWCA as then written. The Court of Appeals holds that since this is so, he is covered now because there was no limitation of coverage by the 1972 amendments.

We suggest that this decision is in conflict with prior decisions of this court, a point which will be covered *infra*..

We also suggest that the conclusion is unwarranted from a reading of the statute, its legislative history and the jurisprudence interpretive thereof. The Court of Appeal, en banc, supports its theorem that there was no intended diminution of coverage from one passage in the Senate report which makes reference to "other employees tradi-

tionally covered." See Footnote 14, 680 F.2d at 1042 and the discussions leading up to and following that footnote. The reasoning seems to be that, since a claimant like Boudreaux would have been covered previously to 1972 by virtue of the geographical location of his injury, he is covered now as a "traditional" maritime worker. That reasoning is clearly a mixing of concepts.[1] Oil field work is not now and never has been "traditional maritime activity." See e.g. *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352 89 S.Ct. 1835 (1969).

In other references, Congress declared that a person was not intended to be covered simply because he happened to be in a covered area. See the House Report reprinted at U.S. Code, Cong. & Adm. News 4698, 4708 (1972). The identical Senate report is at page 13, S. Rep. No. 1125, 92nd Congress, 2d Session.

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[1] The point in this reference seems to be that persons covered previously are "traditionally covered." The reference is to the Senate report, page 16, in that portion of said report, page 16, in that portion of said report which contained the "full analysis." What it said, in pertinent part was:

> "Section 2(a) amended Section 2(3) of the Act to define an 'employee' as any person engaged in maritime employment. The definition specifically includes any longshoreman ... it does not exclude other employees traditionally covered. ***"

In context, the reference to "traditionally covered" employees must be to those engaged in maritime employment, not to those covered under the pre-1972 Act by virtue of their fortuitous injury over navigable waters. This view is confirmed by the other references in this petition wherein fortuitous presence at a particular point was stated not to be sufficient to invoke coverage. See discussion immediately following this footnote.

The reasoning of this Court in its decisions on point since the passage of the 1972 amendments supports this view. Prior to the 1972 amendments, it was enough for coverage that the accident and injury occur over navigable waters. Subsequent to the passage of these amendments, especially in view of the amendments to Sections 2(3) and 3(a) (33 U.S.C. §§902(3) and 903(a)) there was a requirement that *both* a geographical *and* an occupational test be met. This Court has held this (*Caputo, supra*) and reiterated it (*P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328 (1979)). This being so, it necessarily follows that workmen injured on navigable waters might not be covered by the LHWCA because of their failure to meet the occupational test. Certainly, they would meet the geographical test. Boudreaux did, and no one disputes that. However, unless a worker in Boudreaux's category meets the occupational test, he is not covered. At least, that is what this Court has said at least twice.

In this case, the Court of Appeals has stated that it is enough for coverage that the accident occurred on navigable waters. It bottoms that the conclusion on two premises (1) that there was no intention to restrict coverage by the 1972 amendments, and to hold otherwise would restrict coverage, and (2) everything done on the water is by definition maritime.

We suggest that the very conclusion by this Court in *Caputo* and *Ford* that there is now a dual test where before there was only a geographical one, demonstrates the error

into which the Court of Appeals fell, as to both premises mentioned. First, the existence of a dual test indicates by its very existence the fact that some occupations done over the water might not necessarily be maritime. See, for example, the occupations in *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975); *Cert. denied*, 429 U.S. 868, 97 S.Ct. 179 (1976), and in *Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *Vacated and remanded*, 444 U.S. 1028, 100 S.Ct. 697 (1980); *on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131, 101 S.Ct. 953 (1981).

Secondly, and this follows from the first, if we have what amounts to a geographical test (as announced by the Court of Appeal) that is, if there is coverage simply by virtue of the fact that the accident occurs on navigable waters, then, as to such a holding, this Court ought to make it, since it has not yet done so, at least insofar as our research goes.

(2) Argument on Point 2 - *The Decision Below Is In Conflict With Decisions Of This Court.*

The argument here overlaps with the argument above. The refusal of the Court of Appeal to apply the dual situs and status test is one example. The Court of Appeals, having announced its articulated major premise that there was no restriction intended by the 1972 amendments, simply holds that an accident occurring on navigable water was covered by definition. See 680 F.2d at 1042. Put

another way, "situs" *is* "status" where the accident occurs on navigable water.

The point in this is that this Court has held that there is a dual test to be used in determining coverage under the LHWCA. The Court of Appeal has substituted a single geographical test for those accidents which occur over the navigable waters. The result obtained below is in conflict with the decisions of this Court in *Caputo* and *Ford*, both *supra*.

In addition, at least inferentially, the conclusion is justifiable that this Court considers that some workmen who would have been covered by the LHWCA prior to 1972 are not covered now. In making this argument, the writer is mindful of the oft quoted maxim that no definitive conclusion is to be derived from a denial of an application for writs to this Court. However, it is difficult to avoid some significance to this Court's denial of the writ application in *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *Cert. denied*, 429 U.S. 868, 97 S.Ct. 179 (1976).

It is even more difficult to avoid attributing significance to the actions of this Court in the *Fusco* series of cases. *Fusco v. Perini North River Assoc.*, 601 F.2d 659 (2d Cir. 1979); *vacated and remanded*, 444 F.2d 1028, 100 S.Ct. 697 (1980); *on remand*, 622 F.2d 1111 (2d Cir. 1980); *Cert. denied*, 449 U.S. 1131, 101 S.Ct. 953 (1981).

In *Weyerhauser*, the worker was hurt while tending

a log jam on navigable waters. Clearly under the appellate opinion in our cases there would have been coverage, yet the Ninth Circuit held no coverage and this Court denied writs. In *Fusco*, the worker was working on a sewerage treatment plant on navigable waters. Under the opinion of the Fifth Circuit here there would have been coverage. Originally giving reasons somewhat similar to those below in this case, the Second Circuit upheld coverage under the LHWCA. This Court remanded in view of its then recent decision in *P. C. Pfeiffer Co. v. Ford, supra.* The Second Circuit reconsidered and reversed itself, finding no coverage. An application was denied. This leads to the conclusion that the decision at first that there was coverage was unacceptable and that the second decision finding no coverage was acceptable.

In these ways, we suggest that the decision of the Court below is at variance with the letter and spirit of this Court's prior decisions on point, and that this Court should review it.

(3) Argument On Point 3 - *The Decision Below Is At Variance And In Conflict With the Decisions Of The Other Circuits.*

Here, again, there is some overlap from the preceding argument. The *Weyerhauser* and *Fusco* cases have previously been discussed in another context. However, it is plain that, as decisions of the other circuits they are irreconcilable with the decision below, both as to result and

reasoning.

The result below is even at variance with the result in the prior decisions of the Fifth Circuit. See *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978) *Cert. denied* 442 U.S. 909, 99 S.Ct. 2820 (1978) in which a workman drowned on navigable water was held to be not covered by the LHWCA. The reasoning in *Thibodeaux* is ironic because the denial of LHWCA coverage is on the ground that the claimant's decision lacked "status" under the dual test mandated by this Court's opinion in *Caputo, supra.* This is the precise test that the same Court declined to follow in the case at bar.

There are six major maritime circuits. The First, Third and Fourth Circuits have not faced the precise factual setting presented in this case, that is, they have not had to decide whether a person injured over navigable water and, perforce, covered prior to 1972 would be excluded now as a result of the amendment, and as a result of dual inquiry mandated by *Caputo* and *Ford.* However, in the opinions that have come out of those circuits, it appears that their views would be consistent with the position of petitioner here, that is, in each case, the dual inquiry would be made, and the fact that an accident occurred over navigable water would not be enough, and of itself, to create coverage under the LHWCA where the type of employment was not maritime in character. See *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981); *Dravo Corp. v. Banks,* 567 F.2d 593 (3d Cir. 1977);

Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980).

The Second and Ninth Circuits have spoken clearly in the same factual setting presented here, to the effect that situs alone, that is, occurrence over navigable waters by itself, is not enough to create coverage under the LHWCA. See *Churchill v. Perini North River Assoc.*, 652 F.2d 255 (2d Cir. 1981) to the same effect. Only the Fifth Circuit is to the contrary in the opinion which is the subject of this application. And that opinion is contrary to its prior jurisprudence. See *Thibodeaux v. Atlantic Richfield Co., supra.*

We are aware that a writ application to this Court in *Churchill* was granted (Docket No. 81-897, __ U.S. __, 102 S.Ct. 1425 (1982)), and that that case is scheduled for argument shortly. It may very well be that the issues presented in this application will be decided in that case. However, since it appears that Mr. Churchill was loading a vessel, it may very well be that the critical fact will result in a reversal of the Second Circuit short of the issues presented by this Petition.[2]

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[2] See, e.g. *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir., Unit "B", now 11th Cir. 1981). In that case, the claimant was not in an occupation which would have qualified as maritime. However, the circuit Court held (659 F.2d at 58):

> "Because Gilliam was engaged in maritime employment, i.e. longshoring, at the time of his injury, it follows *a fortiori*, that his work had a realistically significant relationship to maritime activities involving navigation and commerce. ..."

The point in this is that, as is demonstrated hereinafter, there is nothing "traditionally maritime" about wirelining.

The point in this argument is that the result obtained below in this case is in conflict with the result in at least two other circuits in indistinguishable factual situations. It is contrary to the stated philosophy of the other three major maritime circuits. The result obtained in this case should not be permitted to stand in view of this.

(4) Argument on Point 4 - *Oil Field Service Work As Inherently Maritime ("Significant Relationship To Maritime Commerce and Navigation").*

As a secondary basis for its conclusion that the juridical relationship between Boudreaux and Aquatek is governed by the LHWCA, the Court of Appeal held that oil field servic rk was inherently maritime, and that it bore a significant relationship to maritime commerce and navigation. See the discussion beginning on page 1052 of 680 F.2d. We suggest that this is directly in conflict with prior decisions by this Court, particularly with the literal sense and the reasoning of *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969). The *Rodrigue* decision involved two cases, *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968) and *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968). Both *Dore* and the *Rodrigue* decedent were doing oil field service work on artificial island platforms in the Gulf of Mexico. The *Rodrigue* decedent, according to the opinion in the appellate Court and here, was doing essentially the same work that Mr. Boudreaux was doing in our case. Conformably with prior jurisprudence, each of the cases was treated as an admiral-

ty case, and only admiralty relief was afforded, rejecting more favorable state relief.

This Court reversed. Among the reasons for the reversal, there is a discussion beginning at 395 U.S. at 360 (89 S.Ct. at 1839):

> The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, it was an island, albeit an artificial one, *and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers.* Indeed, the Court has specifically held that drilling platforms are not within admiralty jurisdiction. (Citation omitted) There a ship damaged a structure "composed of various lengths of wrought iron pipe surrounded by a platform on the surface." Citing the same cases on which the lower court had relied this Court affirmed its conclusion that jurisdiction was lacking since the "project which the libellant was engaged in is not even suggestive of maritime affairs. It was supplying water to a city and the mere fact of the means being carried under the bed of a river, with extensions through the river to the surface, did not create any maritime right, nor was it in any sense an aid to navigation, which was the distinguishing feature of The Blackheath." 162 F., at 496. In these circumstances, the Seas Act—which clearly would not apply under conventional admiralty principles and, since the Lands Act provides an alternative federal remedy through adopted state law, there is no reason to assume that Congress intended to extend those principles to create an admiralty remedy here. And if the Congress had made the 1920 Seas Act applicable, ousting in-

> consistent state law, the artificial island worker would be entitled to far less comprehensive remedies in many cases than he is now. (Emphasis added.)

The quotation is delivered in full because, while the factual context is different, the legal context is precisely the same. The contention there was that the work which *Dore* and the *Rodrigue* decedent were doing was maritime employment, thus begetting the application of the law of the admiralty thereto. The Court, in that discussion, is reaching the conclusion that such is not the case. "...[T]he accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." The point as it addresses the secondary point in this case is that the Fifth Circuit has held that an accident substantially similar to the *Rodrigue* accident, and legally indistinguishable from it was "maritime in character," that the employment Boudreaux was engaged in was "maritime" where Rodrigue's was not.

The only difference between Boudreaux's accident and Rodrigue's accident was that the one occurred on a vessel and the other occurred on a platform. This relates back to the points made above as to the major premise of the Court of Appeals decision. The work is maritime for the sole reason that it is performed on a vessel. That conclusion was invalid in the major premise, and it is equally invalid here. Oil field service work did not bear a significant relationship to maritime navigation and commerce in *Rodrigue*, and the decision in this case that it does here is

in conflict with the prior decision of the Court.

In addition, when considered in the light of the admitted fact that this sort of work must be done on every oil and gas production well, whether on navigable water or on dry land in Wyoming, 2,000 miles from the nearest seashore, the statement that wirelining per se is "inherently maritime" is unsupportable.

In conclusion on the reasons for granting the writ in this case, the decision of the Fifth Circuit is that there is coverage under the LHWCA where an accident occurs on navigable water regardless of the nature of the work being done, this is premised on the proposition that (1) no recession of coverage was intended by Congress in the passage of the 1972 amendments to the LHWCA and (2) Everything done on the water, regardless of what it is, is maritime in nature. This conclusion of coverage is something that this Court ought to decide if it is the law, it is something that is in conflict with the letter and spirit of this Court's decision in a prior case, and is also in conflict with the reasoning of *Caputo* and *Ford.* This is so because wirelining is not something that is done on oil and gas wells on the water. It must be done on all such wells, whether on land, on the water or offshore on platforms.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

MONTGOMERY, BARNETT,
BROWN & READ

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 4TH day of October, 1982, served a copy of the foregoing pleading on all counsel to this proceeding by mailing same by United States Mail, properly addressed and first class postage prepaid.

WOOD BROWN III

A-1

Keith A. BOUDREAUX, Plaintiff,

v.

AMERICAN WORKOVER, INC., et al., Defendants,

AWI, INC., Defendant-Third Party Plaintiff-Appellant,

v.

AMERICAN INSURANCE CO., Third-Party Defendant-Appellee.

No. 80-3287

United States Court of Appeals, Fifth Circuit.*

Unit A

Dec. 7, 1981

On Rehearing and Rehearing En Banc Jan 11, 1982

Nonseamen oilfield specialty worker brought maritime tort suit against the owner of the oil drilling barge upon which he was injured, and the barge owner brought a third-party action for contribution or indemnity against the worker's employer and its insurer. The United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., granted insurer's motion for sum-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

mary judgment, dismissing the third-party complaint, and the barge owner appealed. The Court of Appeals, Tate, Circuit Judge, held that nonseamen oilfield specialty worker injured while performing his duties on a movable oil drilling barge on navigable inland waters was engaged in "maritime employment" so as to be within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

Affirmed.

Gee, Circuit Judge, dissented and filed opinion.

1. Workers' Compensation 262

Before the Longshoremen's and Harbor Workers' Compensation Act can apply, both situs and status requirements must be satisfied, situs turning on geography and status on the maritime-connected nature of the job. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. § 902(3), 903(a).

2. Workers' Compensation 262

Nonseamen oilfield specialty worker injured while performing his duties on a movable oil drilling barge on navigable inland waters was engaged in "maritime employment" so as to be within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

Wood Brown, III, New Orleans, La., for plaintiff.

Dillon & Cambre, Gerard M. Dillon, New Orleans, La., for defendants.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, TATE and WILLIAMS, Circuit Judges.

TATE, Circuit Judge:

We hold that an oilfield specialty worker, injured while performing his employment duties on a vessel (a movable barge) on inland waters, is a "maritime employee" for purposes of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("LHWCA"). We therefore affirm the district court's summary judgment based upon its holding to that effect.

The procedural context in which this central issue of the appeal arises is set forth in an appendix to this opinion. For purposes of this summary judgement determination, the undisputed facts are as follows:

The plaintiff Boudreaux was employed by Aquatek, Inc., as a member of a wireline crew. He was injured on board the defendant AWI's movable (or "semi-submersible") drilling barge, "AWI Rig 6", in inland

waters. The injury occurred while he was performing his duties as a rigger, as a member of Aquatek's wireline crew.

The function of the Aquatek crew was to move the wireline equipment to a barge's new location when it was moved, to hook up the equipment with the use of the rig machinery, and to lower a tool to the bottom of the well for some special purpose, such as testing or correcting some deficiency. The crew and equipment were transported by water to and from the drilling barge on which the wirelining work was to be performed. When a particular wirelining task was completed, the wireline crew and equipment departed for the base or for another assignment.

The record indicates that Boudreaux customarily worked on wireline operations 15-17 days out of each 21-day shift, but it does not indicate whether this time was spent on one or on more jobs, nor does it show the approximate amount of time required for a wireline crew to complete any particular wirelining assignment. The record also indicates that Boudreaux's wireline crew performed a substantial part, if not all, of its work in servicing drilling barges in inland waters.

For present purposes, the parties do not dispute that wirelining operations are an integral or essential part of oil and gas exploration and production activities, whether conducted on land or on water. The appellant AWI suggests, however, that wirelining work is a specialty operation performed by a specialized crew both on land and on

water drilling rigs, and that a wireline crew member injured in the course of such work should not be considered a "maritime employee" so as to be within the coverage of the LHWCA just because of the happenstance that his work-injury occurs on a movable barge (vessel) when it is on inland waters.[1]

I

The single issue before us is whether Boudreaux, at the time of his injury on navigable inland waters, was engaged in "maritime employment" so as to be within the coverage of the LHWCA. Under the 1972 amendments to that Act, to be entitled to its benefits a disabled employee must (a) be disabled as the result of "an injury occuring upon the navigable waters of the United States" (defined as also including adjoining areas), 33 U.S.C. § 903(2)—the "situs" test; and (b) be engaged in "maritime employment" at the time of the injury, 33 U.S.C. § 902(3)—the "status" test.

[1] Both the status requirements, as defined by section 902(3), based on the nature of the job, and the situs requirements, as defined by section 903(a), based on geography, must be satisfied before the LHWCA can ap-

[1] If a member of a similar wireline crew was injured while performing his duties on a movable barge offshore on the Outer Continental Shelf, he would be entitled to LHWCA benefits. See Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, esp. § 1333, which so provides as to employees there injured in operations conducted for the purpose of exploring for, developing, removing or transporting the natural resources of the subsoil and seabed of the Outer Continental Shelf.

ply. *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 73-74, 100 S.Ct. 328, 332-33 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265, 97 S.Ct. 2348, 2357, 53 L.Ed.2d 320 (1977).

Prior to 1972 a single situs requirement of the LHWCA govaerned the scope of its coverage. That requirement limited coverage to workers whose "disability or death result[ed] from an injury occurring upon the navigable waters of the United States (including any dry dock) ...." LHWCA of 1927, ch. 509, § 3(a), 44 Stat. 1426. "[T]he Supreme Court decided that a worker who in the course of his duty was obliged to go on navigable waters, however briefly or sporadically, and who suffered an injury while in that historically maritime locality was covered by the [pre-1972] LHWCA. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 [1962]." *St. Julien v. Diamond M. Drilling*, 403 F.Supp. 1256, 1258 (E.D.La.1973).

In 1972 Congress amended the LHWCA[2] "by replacing the single situs requirement with a two-part situs and status standard." *Pfeiffer, supra*, 444 U.S. at 73-74, 100 S.Ct. at 332-33; *Caputo, supra*, 432 U.S. at 264-65, 97

[2] On two occasions the Supreme Court has indicated that the "language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage," *National Northeast Marine Terminal Co. v. Caputo, supra*, 432 U.S. at 268, 97 S.Ct. at 2359, and that the decision (to focus on the nature, not location of employment) "also serves the broader congressional purpose of expanding coverage. Congress intended to apply a simple, uniform standard of coverage." *Pfeiffer v. Ford, supra*, 444 U.S. at 83-84, 100 S.Ct. at 338.

S.Ct. at 2357. "To be eligible for compensation, a person must be an employee [status] as defined by § 2(3) [33 U.S.C. § 902(3)] who sustains injury on the situs defined by § 3(a) [33 U.S.C. § 903(a)]." *Pfeiffer, supra*, 444 U.S. at 74, 100 S.Ct. at 333. Situs turns on geography; status on the maritime-connected nature of the job. *Id.*, 444 U.S. at 73-83, 100 S.Ct. at 333-37; *Caputo, supra*, 432 U.S. at 265, 97 S.Ct. at 2358-63. Since it is uncontested that Boudreaux was injured over navigable waters, the controversy here concerns only his "status" as a maritime employee.

After the district court granted summary judgment in this case, another panel of this court rendered a decision in *Pippen v. Shell Oil Company and Inland Well Service, Inc.*, 661 F.2d 378 (5th Cir. 1981). *Pippen* involved a legal issue virtually identical to that now before this panel. In *Pippen*, as here, the injured worker was performing wireling work that was essential to the function of the vessel (drilling barge) upon which he was working—i.e., offshore mineral production. The wireline employee was injured while working on a drilling barge on navigable inland waters. The issue in *Pippen*, as here, is whether under those circumstances the wireline employee performing temporary specialty work on the drilling barge was engaged in "maritime employment" so as to be covered by the LHWCA.

Significantly to the issue before us, *Pippen* noted:

> Martime employment is an occupational concept that is dependent upon the nature of the em-

> ployee's activities. *P. C. Pfeiffer Co. v. Ford*, [444 U.S. 69] 100 S.Ct. 328, 335, 62 L.Ed.2d 225 (1979). In order to determine whether an employee's work is maritime in nature, this Court has held that "we must look to the purpose of the work, not solely to the particular skills used." *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 n. 16 (5th Cir. 1980) (carpenter constructing pier was engaged in maritime employment). The relevant inquiry in determining whether an employee was engaged in maritime employment is whether his activities had a " 'realistically significant relationship to traditional maritime activity.' " *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981) (carpentry work on wooden thirty-foot pleasure boat resting on blocks was maritime employment) (quoting *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied*, [429 U.S. 868] 97 S.Ct. 179, 50 L.Ed.2d 148 (1976)). *Fusco v. Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980) maritime employment refers to activities that "bear a significant relationship to navigation or to commerce on navigable waters," [construction of sewage plant not connected to traditional maritime activities], *cert. denied* 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981).

661 F.2d at 382-383.

The test employed by the Second Circuit on remand[3] in *Fusco v. Perini North River Associates*, 622 F.2d 1111 (2d Cir. 1980), was whether the employment bears "a significant relationship to navigation or to commerce on

[3] *Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980), *rev'd on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981).

navigable waters." *Id.* at 1113. The production of oil and natural gas from the beds of navigable bodies of water and the ocean bottom has become a maritime activity. This is a major industry with peculiar maritime-related problems. Employment in an industry that provides approximately 40,000 jobs,[4] and untold millions of dollars in revenues and that takes place primarily upon the navigable waters of the United States, bears "a significant relationship to ... commerce on navigable waters."

In *Pippen*, the court found that the wireline employee's work was, as in the present case, necessary to the completion of the offshore drilling process and it concluded that the work performed "had a realistically significant relationship to maritime commerce," so as to be "maritime employment." *Pippen, supra*, 661 F.2d at 384.

[2] The ruling in *Pippen* is dispositive of the present issue. In the case before us, Boudreaux (like Pippen) was injured on navigable waters while performing wirelining employment duties that were an integral or essential contribution to the mineral-production function of the vessel upon which he was working. The work performed thus "has a realistically significant connection to traditional maritime activity," *Pippen, supra*, 661 F.2d at 385, so as to be "maritime employment" within the coverage of the LHWCA.

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[4] Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Tex.L.Rev. 973 (1977).

II

The legislative history of the 1972 amendments to the LHWCA re-enforces our view that *Pippen* correctly characterized as "maritime employment," for purposes of the Act, wireline specialty work contributing to the function of a movable drilling barge on inland waters.

The question whether an offshore oil worker injured on a "vessel" is covered by the current LHWCA turns primarily upon whether such a worker is engaged in "maritime employment," 33 U.S.C. § 902(3), a "status" test provided by the 1972 amendments. Unfortunately, the bare language of the statute does not answer this question as nowhere does it provide a definition of "maritime employment". While § 902(3) does mention "longshorem[e]n," "harborworker[s]," etc., the Supreme Court has stated that these references are to be considered only as "example[s] of workers who engage in maritime employment ...." *Pfeiffer, supra*, 444 U.S. at 79, 100 S.Ct. at 335. Examination of the legislative history of the 1972 amendments to the LHWCA and the cases that have construed them are helpful in ascertaining what activities are intended to be included within the term "maritime employment."

Even a cursory reading of the legislative history of the 1972 amendments quickly shows that Congress thought only that it was *extending* the scope of coverage of the LHWCA by enacting the bifurcated test referred to

above. *See, e. g.*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (Comm. Print 1972) at v (Foreword by Sen. Harrison A. Williams, Jr., Chrmn.); *id.* at 63 (S.Rep.No.92-1125, at 1) (one of the "principle [sic] purpose[s of the bill] is to ... extend coverage to protect *additional* workers") (emphasis added); *id.* at 64 (S.Rep.No.92-1125, at 2) (the bill "expands the coverage of this Act") (emphasis added). The House report, H.R.Rep. No.141, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Ad.News 4698, is nearly identical to the Senate report both in content and wording, *see, Pfeiffer, supra*, 444 U.S. at 79, n.9, 100 S.Ct. at 335 n. 9; Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Tex.L.Rev. 973, p75 n. 12 (1977). The Senate report does add this, however, in its Section-by-Section Analysis:

> Section 2(a) [of the bill] amends section 2(3) of Act to define an "employee" as *any* person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, [etc., but] *does not exclude other employees traditionally covered*....

Comm. Print at 78 (S.Rep.No.92-1125, at 16) (emphasis added).

In light of the repeated statements made throughout the legislative history to the effect that the change in the scope of the coverage of the LHWCA was meant to extend

protection to additional workers (*i.e.*, certain maritime workers even though injured on land), the specific statement in the Senate report's section-by-section analysis quoted above, and the fact that offshore oil workers injured upon navigable waters would have been covered prior to the 1972 amendments, *Calbeck, supra; see also Hendon v. Marathon-LeTourneau*, 414 F.Supp. 1282, 1284 (S.D.Miss.1976) (mention of LHWCA benefits paid to offshore oil worker for pre-1972 injury); *Case v. St. Paul Fire & Marine Ins. Co.*, 324 F.Supp. 352 (E.D.La.1971) (same), *appeal dismissed as moot*, 456 F.2d 252 (5th Cir. 1972), a persuasive argument could be made that any worker who would have been covered under the pre-1972 LHWCA is still covered under the post-1972 LHWCA. Indeed, the Supreme Court has expressly reserved the question whether "Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined." *Caputo, supra*, 432 U.S. at 265 n. 25, 97 S.Ct. at 2358 n. 25.

Pfeiffer, supra, of course, requires that the "situs" and "status" tests are to be independently satisfied, and holds that "status" is occupational and not geographical in nature. *Pfeiffer, supra*, 444 U.S. at 79, 100 S.Ct. at 335.

However, *Pfeiffer* recognizes that the congressional purpose was to extend coverage. Thus it may be possible to consider that the "status" portion of the test for workers-on-water is satisfied by the fact of their employment on water; but this would distort the statutory language, what-

ever Congress' intent, if the worker's presence on the water is fortuitous and otherwise unconnected with maritime employment. Moreover, at least three cases decided by the courts of appeals, including one by the Fifth Circuit, refuse to consider the mere fact of injury while working on water sufficient for coverage. *See Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980), *rev'd on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981) (worker injured over navigable waters while engaged in constructing sewage disposal project extending over water not engaged in "maritime employment" and thus not covered by LHWCA); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979) (worker who drowned when overloaded crewboat sank was not engaged in "maritime employment," and thus not covered by LHWCA; he was merely being transported to his job site by water, notwithstanding that on the occasion in question the vessel was to stop and place a pollution pan on a sunken barge used as a dock); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976) ("pondman" injured while working at his duties involving the sorting of logs while moving about on walkways and logs that were floating on navigable waters was not engaged in "maritime employment" and thus not covered by LHWCA).

These decisions concern, however, situations where

the employee was injured or killed in an employment activity with peripheral relationship to maritime activity, although the accident occurred on water. The employment activities there concerned, distinguishably from that of Pippen and the present Boudreaux, did not involve the performance of work that was an integral or essential contribution to the function of a vessel upon which the injury occurred.

Moreover, to focus simply upon the task of the employee upon the barge after he got there is too narrow a test. What is important is not the worker's task alone but the industry of which it forms a part. (The harborworker-welder, admittedly covered by the LHWCA, is after all but a welder; his job is indistinguishable from welding on land. The same could be said of the ultimate task of most harborworkers.)

Here Boudreaux was employed in an activity that was an integral or essential contribution to the production of oil and natural gas from the beds of navigable bodies of water and the ocean bottom. Mineral exploration and development on offshore locations has become recognized in maritime jurisprudence as a maritime activity. See *Pippen* and decisions cited therein; *see also,* Robertson, *supra,* 55 Tex.L.Rev. 973. Congress has recognized the maritime nature of this employment by, for instance, extending the LHWCA to cover oil-production activities on the Outer Continental Shelf. (See note 1.) The test of whether the employment is "maritime" for purposes of the LHWCA, as

noted in part I of the text, is whether the employment activities bear a significant relationship to commerce on navigable waters. Employment in an industry which provides approximately 40,000 jobs, *see* Robertson, *supra*, 55 Tex.L.Rev. at 973, and untold millions of dollars in revenues and takes place primarily upon the navigable waters of the United States, we think, must indeed bear a significant relationship to commerce on the navigable waters, particularly when that employment is itself on a vessel, albeit temporarily.

In *Caputo, supra*, the Supreme Court, faced with a similarly difficult question of statutory interpretation of the 1972 amendments to the LHWCA, nevertheless felt not without guidance:

> The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 92, 98 L.Ed. 5 (1953).

Caputo, supra, 432 U.S. at 268, 97 S.Ct. at 2359. Two years later, in finding two dockside workers who were only marginally related to the loading and unloading of ships, covered by the LHWCA, the Court recalled its statements in *Caputo* regarding the liberal construction that should be accorded remedial acts and added, "our decision today also

serves the broader congressional purpose of expanding coverage." *Pfeiffer, supra*, 444 U.S. at 77, 83, 100 S.Ct. at 334, 338. Cf. 33 U.S.C. § 920(a) (1976 ed.) ("In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this chapter.").

We conclude, therefore that "maritime employment" within the legislative intent of the 1972 amendments to the LHWCA clearly includes a specialty worker injured on a drilling rig in inland waters. Further, from a policy standpoint, the legislatively intended uniformity of treatment of maritime and amphibious workers, regardless of situs, would be enhanced if that Act is held applicable to non-seamen specialty workers who are injured on vessels situated in state territorial waters. Otherwise, differing remedies would be provided to workmen injured in the performance of the identical offshore mineral-production employment—remedies would differ, depending on whether the injury occurred in state waters or on the Outer Continental Shelf, and could differ from state to state, depending upon in which state's territorial waters the injury occurred.

Conclusion

Boudreaux was injured while working on navigable waters and while engaged in "maritime employment" within the meaning of the LHWCA. The district court cor-

rectly held that, under the factual showing made for purposes of the summary judgment motion, Boudreaux was a "maritime employee". Consequently, we AFFIRM the judgment of the district court.

AFFIRMED.

[See Appendix attached]

APPENDIX

The issue arises in the following context:

The plaintiff Boudreaux brings this maritime tort suit against AWI, Inc., the owner and operator of the vessel (drilling barge) upon which he was injured. Boudreaux alleges that he was employed by Aquatek, Inc. as a rigger on a wireline crew working aboard the vessel and that he was injured through the negligence of AWI while performing wirelining operations in the course and scope of his employment. AWI subsequently filed a third-party demand against Aquatek (the plaintiff Boudreaux's employer) and its insurer ("American"). AWI alleged that Aquatek's fault was a direct cause of the accident, and it prayed for indemnifying or contributing judgment against these third-party defendants in the event the plaintiff Boudreaux was allowed recovery against AWI.

American, Aquatek's insurer, filed a motion for summary judgment. (It is conceded that, with regard to the issue before us, this insurer asserts the statutory defense of its insured, the employer Aquatek.) The ground upon which this motion was sustained is the statutory immunity of Aquatek, the employer, from any liability to its "maritime employee" within the coverage of the LHWCA, other than the exclusive remedy provided by that Act. 33 U.S.C. § 905.

Thus, if Boudreaux at the time of the injury was a "Maritime" employee provided a remedy by the LHWCA, then his employer Aquatek cannot be held liable to the defendant AWI to indemnify it for, or to contribute to the payment of, any damages awarded to Boudreaux against AWI for injuries sustained in the course of his "maritime" employment. The district court so held, in granting the employer's insurer summary judgment dismissing AWI's third-party demand against it. By virtue of a Rule 54(b) order determining there was no just reason for delay and directing entry of judgment, the dismissal is an appealable judgment.

GEE, Circuit Judge, dissenting:

I, of course, agree that we are presently bound by the very recent panel decision, handed down on November 13, 1981, in *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981). Neither it nor the present majority opinion is necessarily final as yet, however—opportunities for rehearing being present—and since I find myself in respectful disagreement with both decisions, I write to say why.

The fact situations in both cases are essentially identical: an oilfield worker injured while doing a landside job from a drilling barge located on navigable inland waters. The dispositive legal issue in each case is likewise the same: was the injured worker a "maritime employee" covered by the LHWCA? Both panel majorities answer that he was. In each instance, the basic course of reasoning is the same: that the 1972 amendments to LHWCA were intended generally to broaden and in no respect to narrow its coverage; that his work was essential to the mission of the vessel on which he was injured; and that drilling for and producing oil and gas for the inland seas has become—in and of itself—a part of maritime commerce or navigation, so that all persons working in connection with it are maritime employees.

For various reasons, all of these propositions seem to me dubuious: the first is simply incorrect, as the *Pippen* majority tentatively acknowledges in a footnote;[1] the

[1] 661 F.2d at 383 n.7.

second is an argument not for, but against, LHWCA coverage; and the third constitutes a giant legislative step, appropriate for the Congress but scarcely, in my view, for an intermediate appellate court. As to this last, there is little that I can say, since my difference with the majority apparently goes to our differing basic conceptions of the judicial function. If it were appropriate for us, and within our assigned powers, to extend LHWCA coverage to an entire industry because we think that extension wise or just, then my debate with my brothers in the majority would be one about prudence and economic policy. Since, however, I think formation of such major policy more appropriate to the Congress than to nonelective judges, I decline to embark on such a contest. The Supreme Court has consistently deferredd to the expertise and wisdom of Congress in this area. In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969), the Court declared that "[t]he invitation to move [the *Jensen*] line must be addressed to Congress, not to this Court." The Court reiterated this principle in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed.2d 225 (1979). When the Congress wished to effect the last such massive extension of LHWCA coverage, one to the Outer Continental Shelf, it knew how to do so.[2] Following *Pippen*, we do so

[2] See the Outer Continental Shelf Lands Act, which extends LHWCA coverage to employees injured as a result of exploration and development of natural resources *on and underlying* the seabed of the Outer Continental Shelf, 43 U.S.C. § 1333(b) (Supp. III 1979), but carefully omits any extension of sovereignty to the waters there or even to wrecks lying on the seabed. *Treasure Salvors v. Unidentified Wrecked, E.* ., 569 F.2d 330, 339 (5th Cir. 1978).

ourselves today in a comparable area, without benefit of legislative process—no committee hearings, no balancing of risks and economic considerations, no open debate, and no submission to the executive for signature or veto—on the basis of a chain of deductive reasoning. I would not do so. *Contrary to the majority opinion, the 1972 amendments do not solely or indiscriminately broaden coverage.*

A major purpose of the 1972 amendments to what is, after all, styled the "Longshoremen's and Harbor Workers' Compensation Act"[3] was to extend *situs* coverage to areas adjoining navigable waters.[4] As the

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[3] 33 U.S.C. § 901 (1976).

[4] EXTENSION OF COVERAGE TO SHORESIDE AREAS

> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> ....
>
> It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

Supreme Court noted in *Pfeiffer*, 444 U.S. at 72, 100 S.Ct. at 332, 62 L.Ed.2d at 230, Congress in the original LHWCA provided compensation benefits seaward of the water's edge, the limit for state compensation systems under *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). That Act provided only a situs test for coverage, "the navigable waters of the United States (including any dry dock),"[5] and defined employees solely by exclusion, omitting from their numbers members of vessel crews, persons servicing vessels of under eighteen tons, and various government employees.[6] Thus, anyone injured on navigable waters of the United States, with these exceptions, was covered.

(Footnote 4 continued)

> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide *coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employee, unloading, repairing, or building a vessel.*

H.R.Rep.No.1441, 92d Cong., 2d Sess. 11, *reprinted in* [1972] U.S.Code Cong. & Ad.News 4698, 4707-08 (emphasis added).

[5] § 3(a), 44 Stat. 1426 (1927).

[6] § 3(b), 44 Stat. 1426 (1927). Seamen preferred to retain their remedies under the Jones Act and maritime law. *See Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128, 136, 50 S.Ct. 303, 305, 74 L.Ed. 754 (1930).

When the time came, in the 1972 amendments, to extend coverage landward across the *Jensen* line to areas "customarily used by an employer in loading, unloading, repairing or building a vessel,"[7] Congress apparently felt the need—doubtless in view of the types of individuals whose occupations were essentially unrelated to maritime employment who might be found in the new areas covered —to provide a status test as well as a situs one for coverage. This it did by retaining the earlier exclusions for seamen and others and adding the requirement that to be covered one must when injured be an employee "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,...." 33 U.S.C. § 902(3) (1976).

It is thus apparent, and the Supreme Court has held, that the amendment, while adding new areas to the situs requirements for coverage and thus to this extent expanding it, "restricts the scope of coverage by further requiring tht the injured worker must have been engaged in 'maritime employment.' " *P. C. Pfeiffer Co.*, 444 U.S. at 78, 100 S.Ct. at 335, 62 L.Ed.2d 233. It is thus inaccurate to describe the 1972 LHWCA amendments as intended simply to "expand coverage." The accurate assessment is that the amendments aimed to *change* coverage, expanding the situs to which the Act applies by moving the coverage cutoff somewhat landward across the *Jensen* line, while at the

[7] 33 U.S.C. § 903(a) (1976).

same time restricting the class of employees covered within the now expanded situs area. Nor did the Congress leave in doubt that it intended precisely this. In identical passages, both the Senate and the House Reports on the 1972 amendments declare:

> The Committee *does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel,* just because they are injured in an area adjoining navigable waters used for such activity.[8]

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[8] H.R.Rep.No.1441, 92d Cong., 2d Sess. 11, *reprinted in* [1972] U.S.Code Cong. & Ad.News 4698, 4708; S.Rep.No.1125, 92d Cong., 2d Sess. 13 (emphasis added).

The contention, suggested by the Reports' "just because" clause, that the restriction of coverage to stevedores, ship repairmen and similar workers might apply only to the newly-added "adjoining areas" is untenable in view of the Supreme Court's rejection of its mirror image in *Pfeiffer*: "We decline the invitation to construe 'maritime employment' so as to create two differing situs requirements in a single sentence." *P. C. Pfeiffer Co.*, 444 U.S. at 79, 100 S.Ct. at 335, 62 L.Ed.2d at 234.

I also note that Congress in 1971 considered but did not enact S. 1547 and H.R. 11071, companion bills styled the "Marine Petroleum Workers' Compensation Act of 1971," which would have extended LHWCA coverage to all "marine extractive operations." S. 1547, 92d Cong., 1st Sess. (1971); H.R. 11071, 92d Cong., 1st Sess. (1971). These bills were introduced during consideration of several bills to amend LHWCA in 1971, some of which were subsequently enacted as the 1972 amendments.

S. 1547, popularly called the "Tower bill," was intended to overrule decisions that had extended Jones Act coverage to workers on movable drilling barges, *e. g., Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). Introductory Statement of Senator John Tower on S. 1547, Marine Petroleum Workers Compensation Act of 1971, 117 Cong.Rec. 10,490-91 (1971). Senator Tower had introduced this bill in a previous term of Congress as well. *Id.*

Senate testimony on S. 1547 reveals that it was strongly supported by an industry group which claimed that its member companies

We have, in a panel opinion not referred to by the majority, construed and acknowledged these status restrictions as limiting coverage to such persons who are "directly involved" in the activities specified in the committee reports, or perhaps to others sufficently similar to these to be brigaded with them:

(Footnote 8 continued)
voluntarily provided benefits under the Act to employees injured while engaged in marine extractive operations. However, S. 1547 was opposed in testimony on behalf of the class of workers involved. The workers' representatives claimed that making compensation under LHWCA the sole and exclusive remedy for injured workers of this class would diminish the work injury protection currently available under the Jones Act, the Death on the High Seas Act, or state law. *Hearings Before the Sub-committee on Labor of the Senate Committee on Labor and Public Welfare on S. 2318, S. 525, and S. 1547,* 92d Cong., 2d Sess. 60, 256-58, 393-411, 511-59, 574-614. So, just as seamen preferred to to retain their Jones Act and other maritime law remedies at the time the 1927 LHWCA was enacted, *see* note 6 supra, it appears that oil workers argued against inclusion under the 1972 LHWCA amendments.

Robison seamen serving beyond the three-mile limit were again threatened with a change in coverage in 1976 under a proposed amendment to the Outer Continental Shelf Lands Act. H.R. 6218, 94th Cong., 2d Sess. (1976). However, H.R. 6218's threatened change was removed in conference and the resulting legislation died on Congress' adjournment. H.R.Rep.No.1632, 94th Cong., 2d Sess. 8 (1976).

There have also been numerous other bills introduced to amend LHWCA since 1972, as well as hearings analyzing the impact of the 1972 amendments. *See, e. g.,* [1979-80] Cong. Index (CCH) 28,544 (H.R. 7610, 96th Cong.), 28,568 (H.R. 8091, 96th Cong.); [1977-78] Cong. Index (CCH) 28,926 (H.R. 135913, 95th Cong.), 28,970 (H.R. 14387, 95th Cong.); [1973-74] Cong. Index (CCH) 3577 (H.R. 1490, 93d Cong.); *Oversight Hearings Before the Subcomm. on Compensation, Health, and Safety of the House Comm. on Educ. and Labor,* 95th Cong., 2d Sess. 271-92 (1978) (industry testimony and proposed amendment on drilling contractors' and oil companies' liability for offshore operations).

Despite all of this activity from 1971 until the present and despite its obvious awareness of the issue, Congress has not seen fit to do what *Pippen* and the majority do today—riding to the rescue of workers who wish to be left where they are.

> In its reports, Congress has also indicated the extent to which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "directly involved in the loading or unloading functions...".[17] Our holding is that *an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.*[18]

Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 539-40 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *reaff'd as to reasoning*, 575 F.2d 79 (5th Cir. 1978), *aff'd sub nom. P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) (emphasis added). *See also Sohyde Drill. & Marine v. Coastal States Gas Prod.*, 644 F.2d 1132 (5th Cir. 1981),

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[17] [H.R. 92-1441, 1972 Code Cong. & Ad.News at 4708]. (Emphasis supplied.) The same report also stated that clerical employees who do not "participate in the loading or unloading of cargo" would not be covered by the new Act. *Id.*

[18] *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are *sufficiently similar* to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

petition for cert. filed sub. nom. Valero Energy Corp. v. Sohyde Drilling & Workover, Inc., 50 U.S.L.W. 3045 (U.S. Aug. 18, 1981) (No. 81-222), (oil well workover not marine activity).

It seems to me that in ignoring the express language of both houses of Congress and an opinion by our own court, all limiting, with one voice, the meaning of the term "maritime employment" as used in the statutory definition to "loading, unloading, repairing, or building a vessel" and activities *ejusdem generis*[9] with these—such as ship-breaking—and, in defiance of these authoritative and binding statements, extending the term to cover an industry entirely different from shipping and to an entire class of oilfield workers having nothing whatever to do with shipping and its supporting activities, the majority here and the panel in *Pippen* have acted with extraordinary freedom. Their novel departure places them, at least in principle, in a position of conflict with every other circuit that I am aware has considered the matter—the Second, the Fourth, and the Ninth, all major maritime circuits—and with the Supreme court as well.[10]

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[9] *Cf. Walter Tantzen, Inc. v. Shaughnessy*, 624 F.2d 5, 7 (2d Cir. 1980) ("maritime employment" defined *ejusdem generis* to occupations listed in § 902(3)).

[10] The views of the majority and of *Pippen* also conflict with the current interpretation of LHWCA expressed in the opinions of the Benefits Review Board (BRB), the administrative body charged with applying the Act and to which, we recently held, we must give substantial deference. *See Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 999 (5th Cir. 1981).

The Supreme Court and our sister circuits.

The first decision within our circuit to consider the effect of the 1972 amendments on coverage was that of the district court in *St. Julien v. Diamond M Drilling Co.*, 403 F.Supp. 1256 (E.D.La.1975), which extended LHWCA coverage to a specialty oil worker on a drilling barge on the basis of just such a notion of universally expanded coverage. There, commenting on the 1972 amendments to LHWCA coverage, the district court observed:

> *The purpose of the 1972 LHWCA amendments was to expand coverage;* there is no evidence of a congressional intent to restrict coverage previously afforded. See Report of the Senate Sub-committee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., (1972), p. 12; Report of the House Committee on Education and Labor, 92d Cong., 2d Sess. (1972), p. 10; see also Watson, Broadened Coverage under the LHWCA, 33 La.Law Rev. 683, 694 (1973). The Act now defines coverage as extending to "employees engaged in maritime employment." Now, as before the amendments, "workers who are not seamen but who nonetheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment.' " Gilmore and Black, The Law of Admiralty, 2d ed. 1974, p. 428. As those authors state:
>
> > The courts wisely decided, long ago, that for the purpose of the Jones Act and the maritime law remedies, they would not distinguish between the deck hands and the waiters, bartenders, stewards, maids and hairdressers; going to sea was a sufficient

> participation in the risk to entitle the injured worker to his (or her) remedy. In the same way, the fact of waterfront employment should be taken to be a sufficient participation in the risk for the purpose of entitling the injured worker to claim LHCA benefits. Id at p. 430

Id. at 1258 (emphasis added).

These conclusions, resting in part on the notion of generally expanded coverage—and no restriction of existing coverage—under the amendments and in part on analogy to Jones Act authority, take no account whatever of the newly enacted status requirement. Some five years later, however, the Supreme Court expressed the unanimous view that, unlike the Jones Act, the amended Longshoremen's Act does not extend coverage to all workers at a maritime situs. *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979). True, situs is a requirement, though one greatly broadened by the 1972 amendments to abolish "walking in and out of coverage" at the *Jensen* line.[11]

But, the Court declared, there is another requirement, status:

> The discussion of coverage in the legislative history also shows that Congress intended the term "maritime employment" to refer to status rather than situs. Committees in both Houses of Congress recognized:

[11] See our discussion in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1217 (5th Cir. 1980).

> "[T]o take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel,* just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."
>
> This legislative history discusses workers solely in terms of what they are doing and never in terms of where they are working.

Id. at 79-80, 100 S.Ct. at 335-36, 62 L.Ed.2d at 234 (footnotes omitted, emphasis added). Elaborating, the Court continued:

> We believe that § 2(3)'s explicit use of the terms "longshoreman" and "other person engaged in longshoring operations" to describe persons engaged in maritime employment *demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act*....[T]he crucial factor is the nature of the activity to which a worker may be assigned....

> Our decision serves the intent of Congress in creating the status requirement. First, it focuses upon the nature, not the location, of employment. Second, *it does not extend coverage to all workers in the situs area.* There is no doubt for example, that neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the marine situs.

Id. at 82-83, 100 S.Ct. at 336-37, 62 L.Ed.2d at 236-37 (emphasis added). With *Pfeiffer, then, it became plain that St. Julien* was wrongly decided and that determining coverage under LHWCA required both a situs and a status test. Two of our more recent authorities recognizing the dual nature of the requirement are *Hullinghorst Industries, Inc. v. Carrol'*, 650 F.2d 750 (5th Cir. 1981), and *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980), both of which concern carpenters working on the construction of maritime facilities—piers—at that maritime situs. And the *Pippen* opinion itself, cited and relied on extensively by today's majority, recognizes that *St. Julien's* reliance on the concept of a simple expansion of coverage, with no added status restrictions, was no longer viable after *Pfeiffer.* Speaking of *St. Julien, Pippen* observes:

> There, the employee was a stabber whose job was to assist in running casing (pipe) into oil and gas wells. At the time of his death, he was working offshore on a submersible drilling rig. The court found that the LHWCA applied to the action. It noted that there was no evidence that the 1972 amendments to the LHWCA, which replaced the

> original situs test with a dual situs and status test, were intended to restrict the prior coverage of workers injured on navigable waters. *Id.* at 1258. Thus, according to the *St. Julien* court, any worker who would have been covered prior to the 1972 amendments (because he satisfied the situs test) would also be covered after the 1972 amendments; workers who were injured on navigable waters would be assumed to be engaged in maritime employment. *The Supreme Court's holding in Pfeiffer has apparently disaffirmed that analysis. In Pfeiffer, the Supreme Court rejected the contention that the term maritime employment, as used in the § 902(3) status test, incorporates a geographic limitation.* Rather, the Court held that maritime employment "embod[ies] an occupational rather than a geographic concept," and "refers to the nature of a worker's activities." 444 U.S. at 79, 100 S.Ct. at 335, 62 L.Ed.2d at 234.

Pippen v. Shell Oil Co., 661 F.2d 378 at 383 n. 7 (5th Cir. 1981) (emphasis added).

This case and *Pippen* present us with a situation further removed, one in which a worker at a situs indisputably maritime was injured at a task having no maritime connection whatever except its situs. Working over an oil well is an occupation that has no significant relationship to loading or unloading vessels, to harbor work, to navigation, or to commerce on navigable waters. It is a landside job, and one in no sense of a kind with "loading, unloading, repairing, or building a vessel." If such an activity accords LHWCA status, then any landside job will do so if performed at a maritime situs; and Congress' carefully added

status requirement is by us repealed. *Pfeiffer* teaches, however, that such is not the case, that there *is* a status test, and that satisfying the situs test does not in and of itself satisfy the status one.

And, if more be needed, it is apparent in the course of decision evidenced by the recent *Fusco* opinions.[12] Messrs. Fusco and Sullivan were construction laborers building a sewage disposal plant upon navigable waters adjoining New York City. The Benefits Review Board, reversing the decision of an administrative law judge as to Mr. Fusco and affirming that of another as to Mr. Sullivan, held that since both were engaged in a construction project that had no realistically significant relationship to navigation or commerce over navigable waters, neither was engaged in maritime employment, and neither met the "status" test.

Fusco and Sullivan appealed to the Second Circuit, which found each of them covered by the Act and hence reversed the board. 601 F.2d 659 (2d Cir. 1979). Writing pre-*Pfeiffer*, that court reached a conclusion similar to that of our district court in *St. Julien*:

> Weighing all relevant factors, we interpret the critical phrase "person engaged in maritime employment" geographically *so as to include any person whose principal duties are performed on*

[12] *Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980), *rev'd on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981).

> *navigable waters as that term was understood before 1972.* In this case we have no occasion to decide whether the critical phrase also includes a person whose principal duties are on land but who suffers work-related injuries while performing duties upon navigable waters.
>
> *Our conclusion is consistent with the purposes of the Congress—to extend and not to withdraw eligibility*—and avoids the harsh results which would flow from a strictly occupational interpretation.
>
> Since each claimant—that is Fusco and Sullivan—performed his principal duties upon navigable waters as that term was defined in § 3(a) of the original 1927 LHWCA, 44 Stat. 1426, 33 U.S.C. § 903(a), and sustained on such waters a work-related injury, we hold that each was eligible for compensation as "[a] person engaged in maritime employment" within the meaning of § 2(3) of the LHWCA as amended in 1972, 86 Stat. 1251, 33 U.S.C. § 902(3) (1970 ed., Supp. V).

Id. at 669 (footnote omitted, emphasis added).

On petition for writ of certiorari, the Supreme Court vacated that judgment and remanded to the circuit court for reconsideration in light of its intervening *Pfeiffer* decision. 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980).

The circuit court reconsidered its former decision and held it erroneous:

> In our original opinion, without considering whether either claimant was a harborworker, we

concluded that each claimant was a "person engaged in maritime employment" because the term "maritime employment" was to be interpreted geographically as including anyone "whose principal duties are performed on navigable waters." We, therefore, held that each claimant was entitled to compensation.

The conclusion upon which our earlier opinion rested has been rendered untenable by the holdings in *P. C. Pfeiffer v. Ford, supra,* (hereinafter called the *Ford* case) that, as used in § 2(3) of the LHWCA, "the term 'maritime employment' refers to the nature of a worker's activities," 444 U.S. at 79, 100 S.Ct. at 335, 62 L.Ed.2d at 234, and that it is "an occupational rather than a geographic concept." *Ibid.*

While the *Ford* case does not deal with construction workers and the opinion does not address itself to the question whether the 1972 admendments had the effect of depriving any class of workers of benefits which it would have enjoyed under the pre-1972 law, we read the opinion as precluding any application of the LHWCA, as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

....

In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant. It is not significant that the plant was being constructed so that sewage would not cause pollution of navigable waters; nor that the claimants performed part or all of their work

> while upon floating stages or upon barges. The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept—a foundation precluded by the reasoning in the *Ford* case.
>
> Parallel reasoning leads us to hold that the claimants were not within the meaning of § 2(3) "harborworkers." As there used, the term "harborworker" does not refer to the place where the employee works but to the activity he performs. *To come within § 2(3) a harborworker's activity must relate to ships, as is shown by the test of § 2(3) which refers to a "harborworker including a ship repairman, shipbuilder, and shipbreaker."*

622 F.2d at 1112-13 (citation omitted, emphasis added). So reasoning, the court denied the petition of Fusco and Sullivan and affirmed the order of the Benefits Review Board.[13]

On renewed petition for writ of certiorari, this time by Fusco and Sullivan, the writ was denied, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981). I am aware that, as we are frequently cautioned by the Court, in the normal case little is to be attributed to denials of the writ of certiorari. Nevertheless, in such circumstances as these, it is difficult to avoid the conclusion that the result in *Fusco I* was unacceptable to the Supreme Court, while that in *Fusco II* was thought correct.

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[13] Our footnote reference in *Trotti* to the result in *Fusco II*, while correct as to the disposition of the Director's petition, is erroneous as to Fusco's and Sullivan's. 631 F.2d at 1220 n.14.

Thus *Fusco II* represents the position of the Second Circuit and probably that of the Supreme Court as well: being engaged in maritime employment is a prerequisite to being covered by LHWCA, and whether or not employment is maritime is to be gauged by reference to the specific instances set forth in the Section 2(3) definition, the reference to "any longshoreman or other persons engaged in longshoring operations, any harborworker including a ship repairman, shipbuilder, and shipbreaker." 622 F.2d at 1113. The position of the Ninth Circuit, in turn, is illustrated by a decision cited and relied on by the Second at the reference noted just above in *Fusco II*.

In that case, *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir.), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976), the Ninth Circuit addressed a claim to LHWCA benefits made by Mr. Robert Gilmore, a sawmill employee who was injured when he fell from a floating walkway over Coos Bay, a saltwater inlet of the Pacific Ocean. Like the district court in *St. Julien*, the Benefits Review Board had adopted a "general expansion of coverage, without restriction" approach to the 1972 amendments:

> "[*A*]*nyone* covered under the Act prior to the 1972 amendments must indeed be permitted to come within its protection subsequent to the amendments.
>
> "The fact that claimant is called a pondman or millworker is irrelevant as to determining his qualifications as an employee within the terms of

> the Act. Therefore, the Board finds that Claimant's injury in the course of his employment was within the coverage of the Longshoremen's and Harborworkers' Compensation Act, as amended, and he is entitled to benefits."

Id. at 959 (emphasis added). The Ninth Circuit rejected this approach and reversed the Board's decision. In so doing, it held that, for status coverage, an employee's work must bear a realistic relationship to "*the traditional work and duties of a ship's service employment,*" to " '*traditional maritime activity* involving navigation and commerce on navigable waters.' " *Id.* at 961 (emphasis added). The language of the opinion is both correct and apposite here, and it merits direct quotation:

> The Board's erroneous conclusion that Claimant is entitled to LHCA benefits stems from a misinterpretation of the frequently stated "expansion" of coverage by the 1972 amendments. This expansion refers only to the broadened definition of "navigable waters," (maritime jurisdictional requirement) which now includes "adjoining" piers and other areas prescribed in § 903(a). In expanding the maritime situs element of the Act, however, Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area. This intent is manifest in the legislative history. In debate before the House, Representative William Steiger stated:
>
> "[T]he expansion of coverage is intended to bring about a measure of compensation uniformly applicable to *persons customarily considered to be working in the business.* Thus, even if an em-

ployee does not happen to be over navigable waters at the time he is injured, he will be covered *as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it.*" 118 Cong.Rec. 36385, Part 27 (1972). (Emphasis added).

....

The 1972 amended prerequisite of "maritime employment" is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; *i. e.*, the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment."

We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters," with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. (omitted.)

....

> The Law Judge thought that the Claimant at the time of the accident was not so "engaged in maritime employment" and denied the claim. The Law Judge reasoned that in order for the Claimant to recover:
>
> "[A] relationship should exist between the duties of Claimant and some maritime service, navigation or commerce on navigable waters ....
>
> "Here claimant was a mill worker. The navigable water [the long pond] was used as an easy means to transport longs from point to point in the manufacturing process and had no close relationship to any maritime activity ...."
>
> ....
>
> We find it illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as "maritime employment" in the traditional sense.

Id. at 960-961 (citations omitted).

Surely, it seems to me, the same is true here; lumbering, like oil production, is a massive industry, conducted partly on land and partly on navigable waters of the United States. But the work of a tool pusher or wireline operator, wherever conducted, is no more ship's service employment or a traditional maritime activity than is breaking a log jam.

The rule of the Fourth Circuit is to like effect. In

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037 (4th Cir. 1980), *rev'd on other grounds in Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 101 S.Ct. 19145, 68 L.Ed.2d 472 (1981), that court, laying down principles to be observed by the district court in determining LHWCA coverage on remand, observed:

> *Northeast Marine Terminal Co. v. Caputo*, ... emphasized that "maritime employment" must be construed in light of the purpose of the 1972 amendments to LHWCA. These extended its coverage landward in recognition that with the advent of container shipping much work formerly done aboard ship is now performed dockside, and this makes the question whether a claimant was engaged in maritime employment, hence covered by LHWCA, one not dependent simply upon whether his employment positioned him on land or over water. 432 U.S. 269-72, 97 S.Ct. at 2360-61. In recognition that the factual issue in a particular case is more complicated than that, we have focused in our decisions on whether a claimant asserting harbor-worker status was "directly involved" in the work of shipbuilding, though he may not have worked aboard ship, *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 170 (4th Cir. 1978), and on whether a claimant asserting longshoreman status was an "integral part of the unloading process," *Conti v. Norfolk & Western Ry.*, 566 F.2d 890, 895 (4th Cir. 1977). *See Pfeiffer Co. v. Ford*, 444 U.S. at 76, 100 S.Ct. at 334 (1979). This reflects recognition that *Congress did "not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel*, just because they are injured in an area adjoining navigable waters used for such activity." H.R.Rep.No.92-1441, 92nd Cong., 2d Sess. 11, *reprinted in* [1972] U.S.Code

Cong. & Admin.News, pp. 4698, 4708.

Id. at 1050 (emphasis added).

If any other circuit has adopted the views expressed in *Pippen* or by today's majority, I am unaware of it and the majority opinion cites no such instance. To be sure, we are free to adopt our own notions of "expanded coverage" and our own construction of "marine employment," but it seems to me especially unfortunate that in the course of construing and applying a federal statute of national application we now espouse positions that are at clear variance with those of identical congressional reports from both Houses, with those of three major maritime sister circuits and, in all likelihood, with those of the Supreme Court.

The work of the injured employee as "essential to the function of the vessel."

Strangely, both majority opinions stress the essential character of the injured employees' work to the mission of the vessel on which they were injured. It may be that the point intended is merely to tie the employees to what the opinions now declare to be a part of maritime navigation and commerce: offshore mineral production. If so, the matter is material to the discussion that follows in the next sub-heading. But the expressions of the opinions seem also to argue that each was a part of the vessel's crew.

In *Pippen*, for instance, the court observes:

> In the instant case, plaintiff Pippen was a wireline operator. At the time of his injury he was preparing to set packers for perforation. The function of the vessel on which Pippen was working was to drill gas wells; consequently, Pippen's work was essential to the function of the vessel. More importantly, Pippen's job was necessary to the completion of the offshore drilling process.

661 F.2d at 383-84 (footnote omitted).

Today's majority reiterates the circumstance:

> In *Pippen*, as here, the injured worker was performing wirelining work that was essential to the work of the vessel (drilling barge) upon which he was working—*i. e.*, offshore mineral production. The wireline employee was injured while working on a drilling barge on navigable inland waters.

(P. 465). If so, while he may have been a Jones Act seaman, *see Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), he cannot have been a longshoreman: 33 U.S.C. Section 902(3) excludes from LHWCA coverage "a master or member of a crew of any vessel ...." Thus if the majorities are correct in their suggestions, and Messrs. Pippen and Boudreaux were in fact members of a vessel's crew, this would prevent, not provide, LHWCA coverage.

Inland marine oil production as "maritime commerce or navigation."

At the heart of both majority opinions, *Pippen* and today's, lies a simple *ipse dixit;* oil and gas production from thee bed of navigable waters of the United States is maritime commerce or navigation and, therefore, work in connection with it is "maritime employment." To support this sweeping declaration neither opinion, except insofar as today's relies on *Pippen*, advances any basis whatever of prior authority.

Pippen cites three classes of authorities, none supportive of its conclusions except the now-invalidated *St. Julien.* The first are those that stand for the long-established and undoubted proposition that landside-type work done on repairing a boat [*Mississippi Coast Marine, Inc. v. Bosarge,* 637 F.2d 9914 (5th Cir. 1981)], on an actual facility of maritime commerce, a pier [*Trotti & Thompson v. Crawford,* 631 F.2d 1214 (5th Cir. 1980)], or on clearing a navigable channel [*Odom Construction Co. v. United States Dep't of Labor,* 622 F.2d 110 (5th Cir. 1980), *cert. denied,* 450 U.S. 966, 101 S.Ct. 1482, 67 L.Ed.2d 614 (1981)], is maritime in nature. But of course it is, since it all relates to shipping. In the second class cited fall those authorities which deny that work such as Messrs. Pippen and Boudreaux were doing is maritime employment and therefore reject LHWCA coverage. These are *Weyerhauser* (lumber worker), and *Fusco II* (sewage plant construction worked), both discussed above. The third comprises *St. Julien* only, whose "general extension" rationale, *Pippen* admits, 661 F.2d at 383 n.7, was rejected by the Supreme Court in *Pfeiffer.* None of these support, in any degree

whatever, *Pippen's* broad departure. To these today's majority adds only a law review commentary, written before *Pfeiffer* and likewise undermined by it.[14]

Thus the radical extension of LHWCA coverage decreed by *Pippen* becomes plain for what it is, the simple declaration and enactment into law by the court of a policy choice that it thinks desirable. Henceforth in our circuit, shipping and harbor work are to be joined in the category of maritime commerce and navigation by oil field work performed on the inner seas. The last time such a broadcast extension of coverage took place, it was decreed by the Congress in the Outer Continental Shelf Lands Act.[15] *Pippen* decrees the present extension of its own force. For reasons that I have discussed more fully elsewhere,[16] I

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[14] Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex.L.Rev. 973 (1977). The article declares, for example, "The 1972 amendments make clear that all these workers [floating nonseamen hurt within three miles of shore] are now covered by the Longshoremen's Act." *Id.* at 987 (footnote omitted), *citing St. Julien* and the administrative law judge's opinion in *Anderson*, subsequently reversed by the Benefits Review Board, *see* note 10 *supra*. This is, by hindsight, incorrect and far too broad, *e. g. Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979) (oil field worker drowned on navigable inland marine waters on way to work at land site not covered), and *Pfeiffer*. The "Radical Simplification" pled for has not occurred.

I note in passing that this article appears also to supply such factual basis as exists for the majority's broad reference to "40,000 jobs, ... and untold millions of dollars in revenues, etc." (P. 468).

[15] 43 U.S.C. § 1333(b) (Supp. III 1979).

[16] *Starving the Tiger: Some Problems about the Federal Bench*, 34 Southwestern L.J. 1171, 1179 (1981).

think the judicial process ill-suited for making such essentially legislative decisions, proceeding, as it necessarily does, on the basis of deductive reasoning and without adequate consideration of cost factors, of competing values foregone, or of legitimate public views and desires. The present decision seems to me especially unfortunate, since it forces on injured workers a system that they have resisted and Congress has rejected, see note 8 *supra*, places us in a position of conflict with every other maritime circuit that has considered the matter, and insures that there will be one law offshore of Louisiana, Mississippi, and Texas, and another everywhere else. If this were to be done, I think it was for the Congress to do. Had it done so, the national law that we address would be uniform. Today and in *Pippen*, we decree otherwise. I respectfully dissent.

On Rehearing and Rehearing En Banc

Before CHARLES CLARK, BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, SAM D. JOHNSON, WILLIAMS and GARWOOD, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX "B"

Keith A. BOUDREAUX, Plaintiff,

v.

AMERICAN WORKOVER, INC., et al.,
Defendants.

AWI, INC., Defendant, Third-Party
Plaintiff-Appellant,

v.

AMERICAN INSURANCE CO., Third-Party
Defendant-Appellee.

No. 80-3287

United States Court of Appeals,
Fifth Circuit.*
Unit A

July 6, 1982.

Vessel owner and operator appealed from a judgment of the United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., dismissing its third-party demand against injured employee's employer in suit against it by employee for damages resulting from injuries allegedly caused by vessel's negligence. After a panel of the Court of Appeals, 664 F.2d 463, held that employee, injured while performing marine petroleum exploration and extraction work aboard a dril-

*Former Fifth Circuit case, section 9(1) of Public Law 96-452—October 14, 1980.

ling vessel located offshore but on state territorial waters, was engaged in "maritime employment" within meaning of Longshoremen's Harbor Worker's Compensation Act, rehearing en banc was granted. On rehearing, the Court of Appeals, Tate, Circuit Judge, held that: (1) 1972 amendments to the Act did not disturb previous test that the Act covers all injuries on navigable waters of employees whose employers employed one or more workers to labor on navigable waters, and (2) employee was engaged in "maritime employment" within meaning of the Act, and therefore employer was immune from vessel owner's indemnification demand.

Affirmed.

Gee, Circuit Judge, dissented and filed opinion, in which Garwood, Circuit Judge, joined.

1. Workers' Compensation 262

1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, under which the disabled employee, to be entitled to its benefits, must be disabled as a result of an injury occurring upon the navigable waters of the United States and be engaged in maritime employment at the time of the injury, did not disturb previous test that the Act covers all injuries on the navigable waters of employees whose employers employed one or more workers to labor on navigable waters. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33

U.S.C.A. § 902(3).

2. Workers' Compensation 2085

An employee injured while performing marine petroleum exploration and extraction work aboard a drilling vessel located offshore but on state territorial waters was engaged in "maritime employment" within meaning of section of Longshoremen's and Harbor Worker's Compensation Act; therefore, in suit by employee against owner and operator of drilling barge for damages resulting from injuries caused by the vessel's negligence, employer was immune, as an employer covered by the Act, from indemnification demand by owner and operator of drilling barge. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

See publication Words and Phrases for other judicial constructions and definitions.

3. Workers' Compensation 262

Even if 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act required that to be entitled to benefits, the duty of a "maritime employee" must have a significant relationship to maritime commerce or navigation, employee injured while performing marine petroleum exploration and extraction work aboard a drilling vessel located offshore but on state territorial waters was within coverage of the Act, because persons in marine petroleum business who work on drilling vessels in navi-

gable waters are engaged in employment significantly related to maritime navigation and commerce. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. §902(3).

Wood Brown, III, New Orleans, La., for AWI, Inc.

Dillon & Cambre, Gerard M. Dillon, New Orleans, La., for American Ins. Co.

Joshua T. Gillelan, II, Dept. of Labor, Washington, D. C., for amicus curiae Director, Office of Workers' Compensation Program.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, CHARLES CLARK, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, SAM D. JOHNSON, WILLIAMS and GARWOOD, Circuit Judges.

TATE, Circuit Judge:

The sole issue before this court is whether an employee injured while performing marine petroleum exploration and extraction work aboard a drilling vessel located offshore but on state territorial waters is engaged in "maritime employment" within the meaning of section

2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. § 902(3), as amended in 1972.

The question arises in a suit by an amphibious workman against a vessel defendant for damages resulting from injuries caused by the vessel's negligence. The vessel defendant appeals the dismissal of its third-party demand against the workman's employer for indemnification insofar as the injuries were caused by the employer's fault. The precise issue is whether the employer is immune from the indemnification demand as an employer covered by the LHWCA; it is contended that the employer should be denied this immunity because its employee, although injured by maritime tort on a vessel in na.igable waters, was nevertheless not in "maritime employment" and thus not covered by the Act.

A panel of this court, in a split decision, held that the work involved was indeed "maritime employment" within the meaning of the LHWCA. *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1981). Rehearing en banc was granted. 664 F.2d 480 (5th Cir. 1982).

On rehearing, we reach the issue expressly reserved in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 266 n.25, 97 S.Ct. 2348, 2358 n.25, 53 L.Ed.2d 320 (1977): "whether Congress excluded people who would have been covered before the 1972 amendment; that is, workers who are injured on navigable waters as previously

defined."

For reasons to be set forth more fully, we find no Congressional intent to withdraw the coverage of the Act from those injured on navigable waters while engaged in what was considered as "maritime employment" for LHWCA purposes prior to the 1972 amendments.[1] We, therefore, like the panel, affirm the district court's determination in favor of the Act's coverage of this maritime injury.

Facts and Procedural Context

The issue before us arises in the following factual and procedural context, which is more fully detailed in the panel opinion:

The plaintiff Boudreaux was injured over navigable waters in the course of his employment.[2] His employer

[1] We further note (see part VII of this opinion) that the present injury is covered under the amended Act even under the test of "maritime employment" adopted by some post-1972 decisions that, even though the injury occurs on navigable waters, the duties of the employment in which injured must have a significant relationship to traditional maritime activity. *See, e.g., Weyerhaeuser v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied,* 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976). Coverage of the Act on this basis was upheld by the panel majority in the present appeal and, under similar facts, by another panel of this court in *Pippen v. Shell Oil Co.,* 661 F.2d 378 (5th Cir. 1981). (We stayed the issuance of the mandate in *Pippen* pending our present decision on en banc rehearing.)

[2] Boudreaux's accident occurred in Louisiana's territorial waters. Had it occurred on the outer continental shelf, *beyond* state waters, then Boudreaux unquestionably would have been covered by the LHWCA pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b),

("Aquatek") was a contractor performing specialty mineral-production work on a drilling barge. Boudreaux sued the owner and operator ("AWI") of the drilling barge for is negligent failure to provide him with a safe place to work.[3]

The district court dismissed a third-party demand by the defendant AWI (the owner and operator of the *vessel*) against Aquatek (the *employer*) for contribution or indemnity—in the event Boudreaux recovered against Aquatek—based on Aquatek's alleged contributing negligence. The district court thus upheld the contention of the employer AWI that, since it was liable to Boudreaux for LHWCA compensation, it was protected from contribution or indemnity to Aquatek (the vessel) by section 5(b) of the Act, 33 U.S.C. § 905(b) (quoted in note 9 below). This enactment, added by the 1972 revision, expressly provides that an employer of an injured workman covered by the Act shall not be liable to the vessel "directly or indirectly" for any injuries caused to its employee by the negligence of the vessel.

(Footnote 2 continued)
which specifically extends LHWCA coverage to employees there injured in operations conducted for the purpose of exploring for, developing, removing or transporting the natural resources of the subsoil and seabed of the outer continental shelf.

[3] Boudreaux was paid LHWCA compensation payments by the insurer of his employer, Aquatek. As amended in 1972, the Act permits an injured employee to bring suit for negligent injury against third-person vessel parties, section 905(b), 33 U.S.C. § 905(b), subject to employer's right to be reimbursed from any damage recovery for benefits paid, *id.* section 933, 33 U.S.C. § 933. The employer's insurer did, in fact, intervene herein to assert its claim for reimbursement.

Thus, in the context of this litigation, the central issue—whether Boudreaux is covered by the LHWCA as amended in 1972, so as to be entitled to the compensation now being paid to him by his employer's insurer (*see* note 3) —concerns whether a maritime employer, as so recognized for LHWCA purposes prior to the 1972 amendments, is to be denied the immunity from liability for contributing to negligence-caused injury to its employee,[4] an immunity expressly intended by the 1972 amendments to be accorded to employers of persons entitled to LHWCA compensation because of injury in maritime employment. It also concerns whether the 1972 amendments withdrew coverage from the pre-1972 maritime employees injured on the waters.

I. *The 1972 Statutory Provisions*

Prior to 1972 a single situs requirement of the LHWCA governed the scope of its coverage. That requirement limited coverage to workers whose "disability or death result[ed] from an injury occurring upon the navigable waters of the United States (including any dry dock)...." LHWCA of 1927, ch. 509, § 3(a), 44 Stat. 1426. The Supreme Court decided that a worker who in the course of his duty was obliged to go on navigable waters, however briefly or sporadically, and who suffered an injury while in that historically maritime locality, was covered by the pre-1972 LHWCA. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962). *See* Gilmore

[4] *See Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 784 (5th Cir. 1982); *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981).

and Black, The Law of Admiralty, § 6-19 (esp. at 421-22) (2d ed. 1975); 4 Larson, The Law of Workmen's Compensation, § 89.23(b) (esp. at 16-168, 169) and § 89.26 (1982).

Under the 1972 revision of the LHWCA, with its express intent to move the coverage landward (*see* II below), this simple test (generally, injury on the navigable waters) was modified. By the 1972 amendments to that Act, to be entitled to its benefits, a disabled employee must (a) be disabled as the result of "an injury occurring upon the navigable waters of the United States" (defined as also including adjoining areas), section 3(a) of the Act, 33 U.S.C. § 903(a)[5]—the "situs" test; and (b) be engaged in "maritime employment" at the time of the injury, section 2(3) of the Act, 33 U.S.C. § 902(3)[6]—the "status" test.

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[5] 33 U.S.C. § 903(a) provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)....

The remainder of the section provides that no LHWCA compensation shall be payable in respect to the disability or death of a master or member of the crew, of a person engaged by a master to load or unload or repair any small vessel under eighteen tons, or any governmental officer or employee.

[6] 33 U.S.C. § 902 relevantly provides:

> When used in this chapter—
>
> * * * * * *

[1,2] These 1972 requirements for coverage under the Act have been at issue before the United States Supreme Court in three of its decisions. Two of them directly involved the issue of whether land-based employees, not covered by the LHWCA prior to the 1972 revision, were engaged in "maritime employment" at the time of their injuries: *P. C. Pfeiffer Co. Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) and *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). In both of these, coverage was upheld, affording the Act a liberal construction in view of its remedial purpose. Although the issue in the third decision, *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980), was peripheral to the present, that decision nevertheless affords persuasive support to our ultimate conclusion that the 1972 revision was not intended to withdraw from amphibious workers beneficial rights to a worker's compensation remedy previously permitted or enjoyed by them under

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(Footnote 6 continued)

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

the LHWCA prior to its 1972 revision.[7]

Caputo and *Ford*, the first two decisions, concerned land-based employees newly covered by the 1972 revision. They analyzed the 1972 amendments of the LHWCA as "replacing the single situs requirement [*i.e.*, on navigable waters or their statutory equivalent] with a two-part situs and status standard." *Ford*, *supra*, 444 U.S. at 73-74, 100 S.Ct. at 332; *Caputo*, *supra*, 432 U.S. at 264-65, 97 S.Ct. at 2357. "To be eligible for compensation, a person must be an employee [status] as defined by § 2(3) [33 U.S.C. § 902(3)] who sustains injury on the situs defined by § 3(a) [33 U.S.C. § 903(a)]." *Ford*, 444 U.S. at 74, 100 S.Ct. at 333. Situs turns on geography; status on the maritime-connected nature of the job. *Id.*, 444 U.S. at 73-83, 100 S.Ct. at 333-37; *Caputo*, 432 U.S. at 265, 97 S.Ct. at 2358-63. Thus, both the status requirements, as defined by section 902(3), based on the nature of the job, and the situs requirements, as defined by section 903(a), based on geography, must be satisfied before the LHWCA can apply. *Ford*, 444 U.S. at 73-74, 100 S.Ct. at 332-33 (1979); *Caputo*, 432 U.S. 265, 97 S.Ct. at 2357.

We must note, however, that the issue as to "maritime employment" in *Caputo* and *Ford* was with regard to land-based employees on the expanded waterfront situs of compensable accidents added by the 1972 amendment, as to whom the "maritime employment" test was designed to confine the remedy to employees in maritime-connected in-

[7] We discuss this decision more fully in VI below.

dustries and to exclude from coverage non-maritime employees within the expanded shoreward zone. *See* legislative purposes in II below. The Court was there not concerned with employees injured on the actual navigable waters, who were at the time of the 1972 revision already considered to be in maritime employment for purposes of the LHWCA. (Indeed, in *Caputo,* the Court expressly noted that its opinion did not concert persons covered before the 1972 amendment who were injured on navigable waters. 436 U.S. at 266 n.25, 97 S.Ct. at 2358 n.25.)

It is conceded that the present injured worker, Boudreaux, was engaged in employment at the time of the accident that was compensable under the LHWCA prior to the amendment as occurring on the navigable waters. *See Calbeck v. Travelers Insurance Company, supra.* We have examined the legislative history and purposes of the 1972 revision (see II below) and the jurisprudential context in which it occurred (see III below), and we find no intention to dilute the pre-1972 meaning of "maritime employment", with regard to employees actually injured on navigable waters, as including all employees required to work on such waters as part of their duties. *See, e.g., Nalco Chemical Corporation v. Shea,* 419 F.2d 572 (5th Cir. 1969). Thus, we will conclude, an employee injured on the waters in the course of his employment satisfies the 1972 revision's "maritime employment" test, because employment on the water *is* "maritime employment" within the meaning of the LHWCA both before and after its 1972 revision. It therefore satisfies (when injury occurs on the waters) the

1972 "status" test as well as the "situs" test.

We must note here, by way of limitation, that no pre-1972 LHWCA case that we could discover involved the coverage of a person whose employment took him merely transiently or fortuitously to a maritime locus where he was injured, where otherwise except for this isolated incident his employer's business was both land-based and unconnected with maritime-related employment.[8] We express no opinion as to coverage of such a person, an issue not posed by the facts before us.

Before turning to the legislative purposes of the 1972 revision of the Act, we must note the approach established by the Supreme Court in its opinions. This approach to construction of the 1972 revision should, we think, guide judicial interpretation of the changes in the Act accomplished by that revision.

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[8] Possible exceptions to this characterization of the prior jurisprudence are *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184 (1941) and *Ellis v. Gulf Oil Corp.*, 48 F.Supp. 771 (D.N.J.1943), where land-dutied employees whose work had never before taken them on the water were nevertheless allowed LHWCA compensation for death resulting from injury on the navigable waters. For present purposes (since it is unnecessary to decide the broader issue), *Parker*—where an entirely land-based employee of a small boat sales company was drowned while accompanying another employee testing a motor boat on an inland river—can be construed as concerning an employer covered by the Act insofar as maritime injuries because some of his employees from time to time tested boats on the water in the course of their employment.

The pre-1972 Act, 33 U.S.C. §902(4), as does the present, 33 U.S.C. § 902(4) (quoted in note 6), pertinently described an employer covered by the Act as one "any of whose employees are engaged in maritime employment, in whole or in part, upon the navigable waters of the United States***."

With regard to the landward extension of coverage, the Court stated that the "language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage," *Caputo, supra*, 432 U.S. at 268, 97 S.Ct. at 2359, and that the decision to focus on the nature, not location of employment "also serves the broader congressional purpose of expanding coverage. Congress intended to apply a simple, uniform standard of coverage." *Ford, supra*, 444 U.S. at 83-84, 100 S.Ct. at 338. *Caputo* stressed that this "remedial legislation 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' " *Id.* The third post-1972 decision, *Sun Ship, supra* (to be discussed more fully in VI below), involved an attempt, similar to the present, to construe the expanded coverage provisions of the 1972 revision as likewise somehow having the effect of overruling interpretations of the 1927 Act that were beneficial to covered employees.

In rejecting the effort to deduce such an intent from the amendments (that were designed to *expand* coverage), the Court found to be significant, and indeed determinative, the absence in the legislative history of the slightest intimation of any intent to affect prior jurisprudential interpretations with respect to pre-existing coverage afforded by the Act to employees injured in waterfront and seaward accidents. 447 U.S. at 719-22, 100 S.Ct. 2436-37.

II. *Legislative Purposes and History of 1972 Amendments*

In 1972, the Congress amended the LHWCA of 1927, P.L. 92-576, 86 Stat. 1251, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. The expansion of coverage landward, and the consequent addition of the "maritime employment" requirement, were merely part of this 1972 revision, described by *Caputo* as "the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it." 432 U.S. at 261, 97 S.Ct. at 2356. As there stated, *Id.*:

> The main concern of the 1972 Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties.

To achieve the first two of these objectives, the final enactment provided, inter alia, (1) that the liability of the vessel was limited to those injuries caused by negligence and "shall not be based upon the warranty of seaworthiness," and (2) "that the employer [of the covered worker] shall not be liable to the vessel for such [damages caused by vessel

negligence] directly or indirectly." Section 5(b), 33 U.S.C. § 905(b), as added by the 1972 amendments, P.L. 92-576, § 18.[9]

The legislation was enacted after committees of each House submitted full reports, each summarizing the general purposes of the legislation and containing a section by section analysis of the changes provided. Senate report No. 92-1125, 92d Congress, 2d Session [hereinafter cited as "S.Rep.," followed by page number]; House Report No. 92-1441, *reprinted in* [1972] U.S. Code Cong. & Ad.News 4698 [hereinafter cited as "H.Rep.," with USCAN page number]. For instance, with regard to the section 905(b) changes, the reports specifically stated the intention to

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[9] Section 5(b), 33 U.S.C. § 905(b) in full provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence or persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

eliminate any unseaworthiness remedy against the vessel afforded longshoremen and other non-seamen working on board a vessel, and to eliminate any liability of their employer to the vessel for their own breach of duty contributing to the accident. S.Rep. at 2, 8-12, 25; H.Rep. at 4699, 4701-05, 4719. It is also of note that these legislative reports, in stating the reasons for the changes, specifically identify the Supreme Court decisions intended to be legislatively overruled, such as *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956) and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099.[10]

We now turn specifically to the 1972 legislative revision of section 2(3), 33 U.S.C. § 902(3), quoted at note 6, and of section 3(a), 33 U.S.C. §903(a), quoted at note 5. The former, it will be recalled, added the "maritime employment," or status, requirement for employees to be covered by the Act; the latter broadened coverage shoreward to shoreside areas adjacent to navigable waters.

To accommodate the broadened shoreside situs, the former definition of "employer," section 2(4), 33 U.S.C. § 902(4) was amended to broaden the definition of a maritime-employment employer. Before the 1972 amendment, such an employer was defined with reference only to whether some of his employees worked, "in whole or in

[10] These decisions had recognized the legislatively-overruled longshoremen's unseaworthiness remedy (*Sieracki*) and the legislatively-overruled right of the vessel (*Ryan*) to indemnity against the stevedore.

part, upon the navigable waters of the United States (including any dry dock)." After the amendment, the employer was defined as including the employer of those in maritime employment who worked, in whole or in part, upon the expanded shoreside areas as well as upon the navigable waters. As will be shown, because before 1972 the employee's work upon the navigable waters had been the simple test of maritime employment (see III below), a change in the definition of an "employ*ee*," section 2(3) was required in order to affirmatively define which employees in the expanded shoreside situs were now covered.[11]

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[11] Before the 1972 amendment, the definition by section 2(4) simply provided:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

By the 1972 amendment, section 2(4) was amended to provide as definition:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). (Emphasis supplied.)

Prior to the amendment section 2(3), 33 U.S.C. § 902(3), defined "employee" negatively as follows:

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The Act's coverage then resulted from an "injury" in the course of employment, section 2(2), 33 U.S.C. § 902(2), with an "employer," then

These changes are interrelated. As the Supreme Court observed in *Caputo,* whereas before the 1972 amendments, "so long as the work-related injury occurred on navigable waters and the injured worker was not a member of a narrowly defined class,[12] the worker would be eligible for federal compensation provided that his or her employer had at least one employee engaged in maritime employment"; however, "with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate." 432 U.S. at 264, 97 S.Ct. at 2357.

The reasons for the broadening of coverage to the shoreside areas by the section 3(a) amendment are well-documented in the legislative reports: "'[C]overage of the present Act stops at the water's edge; injuries on land are covered by State Workmen's Compensation laws. The re-

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(Footnote 11 continued)
defined in section 2(4), 33 U.S.C. § 902(4), as meaning "an employer, any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any dry dock)."

As noted, the amended section 2(3), as reported by the Senate and House committees and enacted unchanged, now defined "employ*ee*" affirmatively, see note 6 for full text, as "any person engaged in *maritime employment, including* any longshoreman ... harborworker," etc. (Emphasis supplied.)

[12] The Court in a footnote explains "this narrowly defined class" as referring to the LHWCA's exclusion of the master or member of a crew, of a person engaged by the master to load or unload or repair a small vessel under eighteen tons net, and of employees of the United States; noting that these exclusions are retained by the 1972-revised Act (see second paragraph of note 5, above).

sult is a disparity in benefits payable for death or disability depending on which side of the water's edge and in which State the accident occurs. To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate. **" S.Rep. at 12.[13] In explaining the broadening of coverage to extend to shoreside areas adjacent to navigable waters, the report stated: "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.... The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S.Rep. at 13. The House report sets forth identical views in substantially similar language. H.R. at 4707-08.

The reason for the addition, by the 1972 amendment to section 2(3), of the "maritime employment" (or "status") requirement for coverage is not as explicit. Both legislative reports do state in identical language, in apparent

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[13] In this regard, the Committee further observed:

> It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

S.Rep. at 13.

reference to this change: "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.... Likewise the Committee has no intention of *extending* coverage under the Act to individuals who are not employed by a person who is an employer, *i.e.*, a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment." S.Rep. at 13; H.Rep. at 4708 (emphasis supplied). Nevertheless, in the section by section analysis by which the legislative reports explain the reason for the changes, it becomes manifest in our opinion that the 1972 change in definition of an "employee," section 2(3), was not intended to withdraw coverage from those previously considered to be in "maritime employment" for purposes of LHWCA coverage.

The 1972 revision originated as Senate Bill 2318. The Senate committee draft of an amended definition of "employee," section 2(3) of the Act, was enacted by both Houses without change. In explaining the change in definition, the Senate committee report specifically noted that the new definition "*does not exclude other employees traditionally covered*" (emphasis supplied).[14] S.Rep. at 16. The

[14] See full analysis of change in 2(3), S.Rep. at 16:

> Section 2(a) amended section 2(3) of the Act to define an "employee" *as any person engaged in maritime employment.* The definition specifically includes any longshoreman or other person engaged in longshoring operations, any harborworker, including a ship repairman, shipbuilder or ship

house committee report, although less explicit, states the new definition "includes any employee engaged in *maritime employment*, any longshoreman or other person engaged in longshoring operations, and any harborworker (including any ship repairman, shipbuilder, and shipbreaker)" (emphasis supplied).[15]

These committee reports of legislative purpose thus do not reflect any intention to withdraw the Act's coverage from injuries to workmen, such as Boudreaux, injured on navigable waters in the course of employment with an employer at least some of whose employees worked in whole or in part on navigable waters. In particular, the legislative reports do not question or even refer to the holding of *Calbeck, supra*, that the Act's coverage extended to "all injuries sustained by employees on navigable waters," 370 U.S. at 124, 82 S.Ct. at 1202—"a significant omission

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(Footnote 14 continued)

breaker. *It does not exclude other employees traditionally covered* but retains that part of 2(3) which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net. (Emphasis supplied.)

[15] See full analysis of change in 2(3), H.Rep. at 4711:

Subsection (a) amends the definition of the term "employee" contained in section 2(3) of the Act. The present definition merely excludes from the definition of "employee" a master or member of a crew, or any person engaged by the master to load, unload, or repair any small vessel. The new subsection retains this exclusion and states that the term includes any employee engaged in maritime employment, any longshoreman or other person engaged in longshoring operations, and any harborworker (including any ship repairman, shipbuilder, and shipbreaker).

in light of the care which the [committee] reports took to identify Supreme Court cases to be overturned...." See *Sun Ship, Inc., supra,* 447 U.S. at 722, 100 S.Ct. at 2437. It is fair to say, we think, that a reading of the legislative reports, both overall and with specific reference to the "maritime employment" status test newly provided by the 1972 amendment to section 2(3), did not contemplate disturbing the previous *Calbeck* characterization of LHWCA-covered maritime employment as including amphibious workers injured on navigable waters.[16]

In 1962, *Calbeck* ended thirty-five years of confusing and unworkable judicial interpretations by its simple test that the Act covered all injuries on the navigable waters of employees whose employers employed one or more workers to labor on navigable waters. *See Sun Ship, supra,* 447 U.S. at 718, 100 S.Ct. at 2435. The 1972 legislative committee reports reflect no dissatisfaction with this rule, and it is not readily credible that the previous forty-five years of judicial interpretations culminating in *Calbeck* and its progeny were intended to be legislatively altered without any mention of this drastic change to restrict coverage of the Act.

We are reenforced in this view, not only by the si-

[16] Rather, the 1972 amendment was designed to provide a test when injury occurred in the extended shoreside locus newly provided by the 1972 revision by which to exclude those not employed in maritime-related activities. As the legislative reports state, in identical language: "Thus, an individual employed by a person non of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S.Rep. at 13; H.Rep. at 4708.

lence of the legislative reports as to such an intent, but by the consistent explanation for the new provisions as "an *extension* of coverage to shoreside areas," S.Rep. at 12 H.Rep. at 4707 (emphasis supplied). The Senate Report in its "Summary" of the proposed legislation identifies its remedial purposes as "to upgrade benefits" and to "extend coverage to protect additional workers," S.Rep. at 1 (as well as to "resolve the longstanding dispute over third-party actions actions by injured longshoremen" by abolishing (see text at note 10) the unseaworthiness remedy and the vessel-indemnity against stevedores, S.Rep. at 2). The thrust of the summary is that the legislation was designed to broaden coverage and increase benefits.[17] We cannot find that *Calbeck's* well-accepted

[17] The "Summary" of the proposed legislation ultimately adopted as the 1972 LHWCA revision is set forth in S.Rep. at 1-2:

> The principal purpose of S. 2318 is to amend the Longshoremen's and Harbor Workers' Compensation Act in order to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms.
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> . . . . .
>
> The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work.
>
> The bill also resolves the longstanding dispute over third-party actions by injured longshoremen by providing that such actions may be brought against vessels on the basis of negligence, but the remedy based on unseaworthiness is eliminated. In addition, indemnity actions against stevedoring companies are prohibited. Agreements between stevedoring companies and vessels to indemnify the latter are prohibited.
>
> . . . . .

(The omitted paragraphs deal with upward revision of the benefit structure and with administrative changes.)

construction of the Act as covering injuries on navigable waters was silently overruled by a remedial statute designed to broaden coverage and "framed out of solicitude for the workers." *Sun Ship, Inc.*, 447 U.S. at 726, 100 S.Ct. at 2439. To do so, as the Court observed in a similar context, "would blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers." *Id.*

III. *Jurisprudential Context of 1972 Amendments to the Act*

The jurisprudential context in which the 1972 amendments to the Act were enacted makes it plain that a person who suffered an injury that occurred on navigable waters, such as the present plaintiff Boudreaux, was considered to be in "maritime employment" for purposes of the Act. The Court has quite recently summarized this jurisprudential context. *See Ford, supra*, 444 U.S. at 73, 100 S.Ct. at 332, and *Sun Ship, Inc., supra*, 447 U.S. at 718-19, 100 S.Ct. at 2435-36.

As succinctly stated in *Ford, id.:*

> The pre-1972 Act was simply an effort to fill the gap in workmen's compensation coverage created by this Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), which held that state compensation systems could not reach longshoremen injured seaward of the water's edge. A single situs requirement in § 3(a) of the Act governs the scope of its coverage. That requirement limited coverage to workers whose "disability or death

> result[ed] from an injury occurring upon the navigable waters of the United States (including any dry dock)...." Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 3(a), 44 Stat. 1426. In light of *Jensen* and the limited purpose of the Act, the situs test was understood to draw a sharp line between injuries sustained over water and those suffered on land. Thus, in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 218-220, 90 S.Ct. 347, 351-352, 24 L.Ed.2d 371 (1969), this Court held that the Act did not extend to injuries occurring on a pier attached to the land. Although the Court recognized that inequities might result from rigid adherence to the *Jensen* line, the Court concluded that "[t]he invitation to move that line landward must be addressed to Congress, not to this Court." *Id.*, [396 U.S.,] at 224, 90 S.Ct. at 354.
>
> Congress responded with the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (1972 Act).

The intermediate states of jurisprudential development of the coverage issue between *Jensen* and *Nacirema Operating Co. v. Johnson, supra,* are described in *Sun Ship,* 447 U.S. at 718, 100 S.Ct. at 2435.

> [T]he Court began to narrow the *Jensen* doctrine by identifying circumstances in which the subject of litigation might be maritime yet "local in character," and thus amenable to relief under state law. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321 (1922). And, in 1927, Congress was finally successful in extending a measure of protection to marine workers exclud-

ed by *Jensen* by enacting a federal compensation law—the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq....

Federal and state law were thus linked together to provide theoretically complete coverage for maritime laborers. But the boundary at which state remedies gave way to federal remedies was far from obvious in individual cases. As a result, the injured worker was compelled to make a jurisdictional guess before filing a claim; the price of error was unnecessary expense and possible foreclosure from the proper forum by statute of limitations. *Davis v. Department of Labor,* 317 U.S. 249, 254, 63 S.Ct. 225, 228, 87 L.Ed. 246 (1942). After a decade and a half during which there had not been formulated "any guiding, definite rule to determine the extent of state power in advance of litigation," *id.,* at 253, 63 S.Ct., at 227, the Court determined that the border between federal and state compensation schemes was less a line than a "twilight zone," in which "employees must have their rights determined case by case...," *id.,* at 256, 63 S.Ct., at 229. Within this zone, *Davis* effectively established a regime of concurrent jurisdiction.

Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962), further overlapped federal and state law coverage for marine workers. *Calbeck* held that the LHWCA comprehended "all injuries sustained by employees on navigable waters," *id.,* at 124, 82 S.Ct., at 1202, without regard to whether the locus of an event was "maritime but local," and hence within the scope of state compensations provisions.[18]

[18] For more detailed discussions of the evolution of the LHWCA, see generally Gilmore & Black, The Law of Admiralty, 404-23 (2d ed 1975); 1A Benedict on Admiralty §§ 1-11 (7th ed. 1981).

Thus, as summarized by *Sun Ship*, 447 U.S. at 719, 100 S.Ct. at 2436.

> Before 1972, then, marine-related injuries fell within one of three jurisdictional spheres as they moved landward. At the furthest extreme, *Jensen* commanded that nonlocal maritime injuries fall under the LHWCA. "Maritime but local" injuries "upon the navigable waters of the United States," 33 U.S.C. § 903(a), could be compensated under the LHWCA or under state law. And injuries suffered beyond navigable waters—albeit within the range of federal admiralty jurisdiction—weree remediable only under state law. *Nacirema Co. v. Johnson, supra.*

That all employment-related injuries on navigable waters, including those that were characterized as "maritime but local," were considered to have been in maritime employment, can be seen not only from the decisions of the era, *see, e.g., Nalco Chemical Corporation v. Shea, supra*, 419 F.2d at 574,[19] but also by considering that under the pre-1972 scheme of coverage (see note 11), as now, the Act applied only to employers whose employees were "employed in maritime employment, in whole or in part upon the navigable waters of the United States." Section 2(4) of the Act, 33 U.S.C. § 902(4). And

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[19] We conclude that Quave's activities were sufficiently maritime to fall within the scope of 33 U.S.C. § 902(4). It is noted that this section of the Act covers all employers whose employees are engaged in maritime employment "in whole or in part." This becomes significant here for Quave's activities were often over water and it was over water that the fatal accident took place. His regular duties consisted in large part of travelling directly to offshore drilling platforms which he could only reach by boat or seaplane.

aside from its statutory meaning for purposes of the LHWCA, the term "maritime employment" includes even in a nontechnical, general sense, employment upon the navigable waters.[20]

Under the pre-1972 jurisprudence, thus, an injury in "maritime employment" included, for purposes of the Act, all work injuries of amphibious workers on navigable water. Given this accepted pre-1972 meaning of the term for purposes of the Act, then within the intention of the 1972 amendments an amphibious worker injured on the navigable waters simultaneously meets both the "situs" and the "status" (occupational) tests. As earlier noted, the legislative purpose of adding the "maritime employment" test was to limit the Act's coverage in the newly extended shoreside areas to those employees who were injured therein in the course of maritime-related employment. We can find no sign in the legislative history or purpose that the Congress intended by the 1972 amendments to change the prior well-accepted understanding that an injury on navigable waters was compensable as being in "maritime employment."

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[20] Persons engaged in maritime employment may be divided into two broad groups: members of the crew of a vessel in navigation who are generally referred to as seamen, and local waterfront workers doing a variety of ship to shore duties.

1A Benedict on Admiralty, *supra*, note 18, at p. 1-2.

> On the basis that there can be nothing more maritime than the sea, every employment on the sea or other navigable water should be considered as maritime employment.

Id. at p. 2-5.

IV. *Post-1972 Commentary and Jurisprudence*

Following adoption of the 1972 amendments, the new "maritime employment" status test has arisen for application in two situations. The bulk of the litigation concerns application of the test in the new extended shoreside application, as in *Caputo* (1977) and *Ford* (1979), which we have discussed at I above. A substantial minority of the decisions of the lower courts, however, attempted to apply a status test in some formulation to work-related injuries on navigable waters—*i.e.*, to those considered as in "maritime employment" prior to the 1972 revision—, although in all but three or four instances (only one from this circuit), coverage was nevertheless upheld.

Preliminarily, we note that the majority view of the commentators, including the highly respected Gilmore and Black, is that the amended Act does not exclude coverage from anyone who would have been covered under the original Act; and thus that any injury upon the navigable waters is still compensable.[21] This view has also had the consistent support of the director of the Office of Workers' Compensation Programs, the administrative agency charg-

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[21] *See, e.g.*, Gilmore & Black, *supra cit.* n. 4, at 428-30; 1A Benedict on Admiralty, *supra* n. 4, at §§ 17, 19; Norris, The Law of Maritime Personal Injuries § 66, at 75 (3d ed. supp. 1982); Robertson, *Injuries to Marine Petroleum Workers; A Plea for Radical Simplification*, 55 Tex.L.Rev. 973, 986-87 (1977); Comment, *Broadened Coverage under the LHWCA*, 33 La.L.Rev. 683, 694 (1973); Note, 54 N.C.L.Rev. 925, 940 (1976). *Contra*, 4 Larson, The Law of Workmen's Compensation §§ 89.27, 89.41 (1982); Tucker, *Coverage and Procedure under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 172 Amendments*, 55 Tul.L.Rev. 1056, 1062 (1981).

ed with enforcement of the LHWCA.[22] This court has held that the director's views are entitled to deference.[23] These authorities rely primarily on the legislative history and the remedial purposes of the 1972 amendments in support of the proposition that the amended Act does not exclude anyone who would have been covered prior to 1972.

In the adjudicative context, at least prior to 1979, it appeared that this position would be widely accepted. It was adopted by the Benefits Review Board ("BRB"), the entity created by the 1972 amendments to hear administrative appeals of LHWCA coverage disputes.[24] Furthermore , this "no exclusion of those traditionally covered" doctrine was initially embraced by the courts in *St. Julien v. Diamond M Drilling,* 403 F.Supp. 1256 (E.D.La.1975), and *Fusco v. Perini North River Associates,* 601 F.2d 659 (2d Cir. 1979), *vacated,* 444 U.S. 1028, 100

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[22] The Director has filed *amicus* briefs to this effect in a number of cases, including this one, and he once proposed published guidelines that would accord with this conclusion. *See* 39 Fed.Reg. 18268 (May 23, 1974).

[23] *See Miller v. Central Dispatch, Inc.,* 673 F.2d 773 (5th Cir. 1982); *Alford v. American Bridge Division, U.S. Steel Corp.,* 642 F.2d 807, 809 (5th Cir. 1981). The panel dissent inadvertently asserted, 664 F.2d at 473 n. 10, that we must give deference to the view of the Benefits Review Board. Rather, as indicated in *Miller* and *Alford,* deference is owed to the Director, not to the BRB.

[24] *See, e.g., Stewart v. Brown & Root, Inc.,* 7 Benefits Review Board Service ["BRBS"] 356, 361 (1978), *aff'd on other grounds sub nom. Brown & Root, Inc. v. Joyner,* 607 F.2d 1087 (4th Cir. 1979), *cert. denied,* 446 U.S. 981, 100 S.Ct. 2960, 64 L.Ed.2d 837 (1980); *Gilmore v. Weyerhaeuser Co.,* 1 BRBS 180, 182-83 (1974), *rev'd* 528 F.2d 957 (9th Cir. 1975, *cert denied,* 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976).

S.Ct. 697, 62 L.Ed.2d 664 (1980) ("*Fusco I*").

[3] The first decision to take a more restrictive view of the LHWCA coverage of injuries on the actual water was *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976). *Weyerhaeuser* rejected the BRB's construction of the 1972 amendments as not affecting the pre-1972 construction of maritime employment that included all work-injuries on the water. Instead, the Ninth Circuit held that the term "maritime employment" means that the employment "must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters.' " 528 F.2d at 961 (a test it educed from *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972)—a decision we find inapposite for this purpose, for reasons to be stated in V below). Thus, under the *Weyerhaeuser* test, some employees whose injuries would have been covered under the pre-1972 Act would not be entitled to LHWCA coverage. The *Weyerhaeuser* court relegated *Calbeck* and the other pre-1972 decisions "to limbo," based on the conclusion that the 1972 amendments "radically changed the basis for an employee's entitlement to federal compensation." 528 F.2d at 960.

In recent years, the more restrictive *Weyerhaeuser* test has been accepted, or at least given lip service, by many courts, including this court. Ironically, the case that proved to be the catalyst for the widespread acceptance of

the restrictive *Weyerhaeuser* view regarding accidents upon the actual water was the Supreme Court's decision in *Ford, supra*, a case that actually *expanded* LHWCA shoreside coverage.

Subsequent to *Ford*, over the dissent of three justices, the Supreme Court vacated and remanded the Second Circuit's *Fusco I* decision for reconsideration in light of *Ford. Perini North River Associates v. Fusco*, 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980). On remand, despite the fact that *Ford* took a very expansive view of LHWCA coverage, and despite the fact the *Ford* did not so much as mention the *Weyerhaeuser* "significant relationship to navigation or commerce on navigable waters" test for determining "maritime employment," the Second Circuit found that *Ford* had "rendered untenable" its holding in *Fusco I*. Noting *Ford's* conclusion that the term "maritime employment" is an occupational concept, based on the nature of a worker's activities, the Second Circuit read *Ford* "as precluding any application of the LHWCA as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." *Fusco v. Perini North River Associates*, 622 F.2d 1111, 1112-13 (2d Cir. 1980), *cert. denied*,[25] 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981) ("*Fusco II*"). The *Fusco II* court noted that such a

[25] In *Fusco II*, there appears to have been doubt whether the claimant would have been covered under the pre-1972 version of the Act. In that case, the government opposed the petitions for certiorari because the record failed to establish definitively "that [t]he claimants would have been covered under the pre-1972 Act." *Fusco II, supra*, Brief for Federal Respondent in Opposition, Nos. 80-639 and 80-651, at 18.

reading was consistent with the construction of the term "maritime employment" given by the *Weyerhaeuser* court, and with the position of the BRB, which, after having been reversed by the Ninth Circuit in *Weyerhaeuser*, had overruled its previous decisions that had held that the 1972 amendments did not in any way reduce the traditional coverage of the LHWCA.

Since 1979, the *Weyerhaeuser—Fusco II* "realistically significant relationship to traditional maritime activity" test for determining whether an individual was engaged in "maritime employment" has frequently been employed by the courts, in cases involving accidents both on the seaward and shoreward sides of the *Jensen* line. In this circuit, the *Weyerhaeuser* test has been cited approvingly in several decisions of the court, in cases involving accidents both on the land and the water;[26] nevertheless, LHWCA coverage was found in all of the cases.[27] As might be ex-

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[26] *See, e.g., Miller v. Central Dispatch, Inc., supra*, 673 F.2d at 781 (water); *Boudreaux v. American Workover, Inc., supra*, 664 F.2d at 465-66 (water); *Pippen v. Shell Oil Co., supra*, 661 F.2d at 382 (water); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 56-57 (5th Cir. 1981) (water); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 756 (5th Cir. 1981) (pier), *cert. denied*, __ U.S. __, 102 S.Ct. 1937, 71 L.Ed.2d 319 (1982); *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 998 (5th Cir.) (land), *modified*, 657 F.2d 665 (5th Cir. 1981); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 (5th Cir. 1980) (land); *Odom Construction Co. v. United States Dep't of Labor*, 622 F.2d 110, 113 (5th Cir. 1980) (land), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1482, 67 L.Ed.2d 614 (1981).

[27] *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979), the only Fifth Circuit case in which an employee injured on water was deemed not to be covered by the amended LHWCA, did not discuss the *Weyerhaeuser* "significant relationship to traditional maritime activities" test. *See* note 29 below.

pected from application of a test that requires determination case-by-case under the specialized facts of each instance, the *Weyerhaeuser* test—even though recovery has ultimately been upheld—has produced sharp disagreement as to whether under particular facts the on-water employment indeed had the talismanic "significant relationship."[28]

It is of some significance to note that, despite the sometimes cumbersome methodology involved in the disputable borderline case-by-case application of the *Weyerhaeuser* "significant relationship" test, actually in only three decisions was coverage denied by it to a workman injured waterward of the *Jensen* line who would apparently have been covered by the pre-1972 Act under *Calbeck: Weyerhaeusser* itself, by the Ninth Circuit; *Fusco II* (but see note 25) by the Second; and, adhering to *Fusco II*, *Churchill v. Perini North River Associates*, 652 F.2d

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[28] *See, e.g., Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 784 (5th Cir. 1982) (BRB holds that a guard/driver injured on a vessel was not engaged in employment with a realistically significant relationship to maritime activities—the court reverses, expressing amazement "how the BRB could fail to find Ms. Miller's employment as maritime"); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 34 (1st Cir. 1980) *cert. denied*, 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed.2d 952 (1981) (ALJ finds that claimant's relation to waterborne transportation at the time of his injury was too remote for LHWCA coverage—the court affirms the BRB's reversal of the ALJ's decision, noting that on the administrative remand after BRB reversal the ALJ entered an order in accordance with the Board's order "while protesting vehemently that his earlier ruling was correct," 637 F.2d at 34). *See also* the dissent from the panel opinion in the present case, 664 F.2d at 469, 479 (dissent characterizes majority's conclusion that the claimant's employment was "significantly related" to maritime activities as a "sweeping declaration" without "any basis whatevear of prior authority").

255 (2d Cir. 1981), *cert. granted*, __ U.S. __, 102 S.Ct. 1425, 71 L.Ed.2d 647 (1982). (Also, although not employing the *Weyerhaeuser* rationale, one decision of this court denied coverage for an on-water accident of an oil field worker, who presumably would have been covered under *Calbeck*, on a basis subsequently disapproved by *Ford* and subsequent decisions of this circuit. *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978).[29]

V. *Distinction Between Shoreside and On-Water Injuries Insofar as Being in "Maritime Employment"*

We have found no legislative intent to alter the

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[29] In *Thibodaux*, the oil field worker was regularly transported by water (a canal) to his worksites. The court held that the worker was not engaged in "maritime employment" under the Act because he did not spend part of his time " 'indisputably' as a longshoreman, harbor worker, ship repairman, shipbuilder, or shipbreaker," nor was he "actually involved in the loading, unloading, repairing, shipbuilding, shipbreaking process, or an integral part thereof, at the time he unfortunately met his death." 580 F.2d at 845.

Pretermitting whether such a test was ever applicable to an amphibious worker injured on the water, we noted in *Miller v. Central Dispatch*, 673 F.2d 773, 780 (5th Cir. 1982) (emphasis added):

> Under the status test, the essential requirement is that the claimant must be "engaged in maritime employment." Although "maritime employment" is not specifically defined in the Act, the Supreme Court has indicated that this requirement is occupational rather than geographical. *P. C. Pfeiffer Co. v. Ford*, 444 U.S. at 78-81, 100 S.Ct. at 335-36, 62 L.Ed.2d at 233-35. While § 902(3) specifically grants coverage to longshoremen, harbor workers, shipbuilders, etc., *the Act encompasses occupations beyond those specifically listed. P. C. Pfeiffer Co. v. Ford*, 444 U.S. at 77 N.7, 100 S.Ct. at 334 n.7, 62 L.Ed.2d at 233 n.7...(Emphasis supplied)

previously accepted construction of the Act as considering employment on the navigable waters to be "maritime employment." See II and III above. For employees injured in the course of such employment, no further examination into the relationship of their employment activities to " 'traditional maritime activity involving navigation and commerce on navigable waters,' " *Weyerhaeuser supra*, 528 F.2d at 961, is necessary, because by settled construction of the Act their duties necessarily constitute such maritime activity.

However, as we noted, *see* text *supra* at note 11, the 1972 expansion of situs to include shoreside areas required a different change both in the definition of "employ*er*" to include those within the expanded situs and also in the definition of "employ*ee*" so as to exclude those employees injured in the expanded shoreside situs who were not engaged in maritime-related employment. As the legislative committee reports stated, the 1972 revision to include shoreside areas was not intended to cover employees "just because they are injured in an area adjoining navigable waters" or who were *not* "engaged, in whole or in part in some form of maritime employment." S.Rep. at 13; H.Rep. at 4708.

To delineate only those shoreside employees who were legislatively intended to be included within the coverage of the Act, the *Weyerhaeuser* or an equivalent maritime-relationship test may indeed be appropriate.[30]

[30] Thus, in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750

Where we part company with *Weyerhaeuser* is in its application of such a test to those injured while working on navigable waters, construed for LHWCA purposes as being in maritime employment since *Calbeck*. As earlier noted, to restrict this accepted statutory construction is to

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(Footnote 30 continued)
(5th Cir. 1981), we summarized some of the jurisprudential criteria that have evolved in the determination of whether workers—when injured in the shoreside areas newly covered by the 1972 amendment—were engaged in "maritime employment" within the legislative intent. In upholding coverage, we there stated, 630 F.2d at 756:

> Carroll's work in erecting the scaffolding was an integral part of an indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. It was not merely "incidental" to that project, *see Dravo Corp. v. Banks*, 567 F.2d 593, 595-96 (3rd Cir. 1977) (unskilled laborer spreading salt on ice at shipyard not engaged in maritime employment), nor was it the type of job "peripherally related to maritime matters that Congress said was not to be covered by the LHWCA, such as trans-shipment of stored cargo or clerical work," *see Odom Construction Co. v. United States Dep't of Labor, supra* [622 F.2d 110 (5th Cir. 1980)], 622 F.2d at 113. It was an integral step in a maritime project of the type that could be performed by a typical harborworker. *See id.* at 112. It directly furthered the maritime goals of the Wyandotte port facility—the loading and unloading of ships. *See Trotti & Thompson v. Crawford, supra* [631 F.2d 1214 (5th Cir. 1980)], 631 F.2d at 1220. It clearly bore a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters'...." *Odom Construction Co. v. United States Dep't of Labor, supra*, 622 F.2d at 113. That the skills utilized by Carroll were "essentially nonmaritime" in character is immaterial. It is the purpose of the work that is the key; "nonmaritime" skills applied to a maritime project *are* maritime for purposes of the "maritime employment" test of the Act. *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 997-98 & n.7 (5th Cir. 1981); *Trotti & Thompson v. Crawford, supra*, 631 F.2d at 1221 nn. 15, 16. *See Odom Construction Co. v. United States Dep't of Labor, supra*, 622 F.2d at 112-13.

do so in the complete absence of any intent expressed in the legislative history to do so and, in fact, in the face of express statement by the legislative drafters that the new 1972 definition of employee afforded by the amended section 2(3) "does not exclude other employees traditionally covered." S.Rep. at 16. See II above.

Weyerhaeuser derived its "significant relationship" test for coverage, 528 F.2d at 961, by direct quotation from *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). That decision is inapposite to the issue now before use. The sole issue in *Executive Jet* was whether there was federal jurisdiction over a suit for damages resulting from an airplane crash into navigable waters, and there the assertion of jurisdiction was based solely upon the provision of 28 U.S.C. § 1333(1) granting federal district courts jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction." The Court emphasized that in flights between points in the continental United States, "which are principally over land, the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 U.S. at 266, 93 S.Ct. at 503. The Court held that

> the mere fact that the alleged wrong "occurs" or "is located on" or over navigable waters...is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims aris-

> ing from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

409 U.S. at 2681, 93 S.Ct. at 504.

Executive Jet is thus entirely inapposite to the issues before us. Although the issue there and here each involved a determination of legislative intent in the utilization of the term "maritime," two entirely different statutes are concerned, each with different legislative histories and jurisprudential interpretations over the course of decades.[31] Unlike *Executive Jet*, which involved no specific legislation addressed to the issue, here the LHWCA both in its 1927 enactment and its 1972 revision provided for coverage of injuries in "maritime employment" occurring "upon the navigable waters of the United States," which the Court in *Celbeck* had interpreted to include all injuries in the course of employment upon the navigable waters. Finally, marine petroleum workers are not "fortuitously" located on the water, but are required to work there by the nature of their jobs, a substantial maritime relationship.

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[31] Our decision in *Sohyde Drill & Marine v. Coastal States Gas Production*, 644 F.2d 1132 (5th Cir. 1981) may be likewise distinguished as inapposite as concerning solely the legislative intent of the Admiralty Jurisdiction Act, 46 U.S.C. § 740. That statute recognized federal admiralty and maritime jurisdiction over cases of injury caused by a vessel on navigable water, notwithstanding that the injury was done or consummated on land. Following *Executive Jet's* rationale, and *considering the legislative purposes of the statute at issue*, we determined that the well blow-out in *Sohyde* did not possess sufficient maritime relationship to permit exercise of the federal admiralty jurisdiction under the cited statute.

VI. *No Intention to Reduce Prior Coverage of On-Water Injuries: The Contribution of Sun Ship*

The rationale in *Sun Ship, Inc. v. Pennsylvania, supra,* supports our conclusion that the legislative history of the 1972 amendments reflects no intention to disturb the prior *Calbeck* interpretation of the Act that work-injuries on navigable waters were incurred in maritime employment for purposes of the LHWCA.

The issue in *Sun Ship* was whether the shoreside extension of the Act's federal compensation coverage displaced *state* workers' compensation laws applicable to those on-land injuries, a concurrent *state* compensation remedy available under pre-1972 LHWCA interpretations to workingmen injured in "maritime but local" activities. The issue is the obverse of the present, which is: did the 1972 revisions reflect any intent to remove a *federal* compensation remedy formerly available to those amphibious workmen injured while working on navigable waters? Nevertheless, the issue is generically similar; as *Sun Ship* recounted, 447 U.S. 718-19, 100 S.Ct. at 2435-36 (quoted in III above), both the concurrent state-federal remedy for "maritime but local" workers, as well as the *Calbeck* holding that the LHWCA comprehended "all injuries sustained by employees on navigable waters," 370 U.S. at 124, 82 S.Ct. at 1202, resulted after years of tortuous litigation attempting to solve the same problem:

Under the "maritime but local" doctrine, a state, in-

stead of a federal, remedy was accorded a workman injured on navigable waters, if neither his general employment nor his activities at the time of the accident "had any direct relationship to navigation or commerce." *Grant Smith-Porter Co. v. Rohde,* 257 U.S. 469l, 475-76, 42 S.Ct. 157, 158, 66 L.Ed. 321 (1922). However, the state remedy would be disallowed—and the federal remedy was exclusive—if the Court found that the employment was "not [a] matter of purely local concern," but instead had "direct relation to commerce and navigation." *Northern Coal & Dock Co. v. Strand,* 278 U.S. 142, 144, 49 S.Ct. 88, 89, 73 L.Ed. 232 (1928). *Sun Ship* describes the uncertainties, hardships, and requirement for litigation by "jurisdictional guess," 447 U.S. at 718, 100 S.Ct. at 2435, that resulted from the necessity on a case by case basis to determine whether an amphibious worker's employment had sufficient "direct relation to commerce and navigation" so as to be compensable under the federal or the state remedies respectively. To solve this identical problem, concurrent state and federal remedies were recognized for "maritime but local" land-based employees (*Davis, supra,* discussed in III), while *Calbeck* held that all work-injuries on the navigable waters were compensable under the LHWCA "without regard to whether the locus of an event was 'maritime but local,' and hence within the scope of state compensation provisions." *Sun Ship,* 447 U.S. at 718, 100 S.Ct. at 2435.

Sun Ship examined the legislative history and reports of the same 1972 amendments as are at issue before us. 447 U.S. at 719-725, 100 S.Ct. at 2436-39. Citing the

complete absence of any reflected intent to abrogate the doctrines of *Davis* and *Calbeck*, the Court held that the 1972 amendments could not fairly be understood as "resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in *Davis* and *Calbeck*," 447 U.S. at 719, 100 S.Ct. at 2436. The Court also noted that so to adopt the appellant's position "would thrust employees into the same jurisdictional peril from which they were rescued by *Davis* and *Calbeck v. Travelers Insurance Co.*" 447 U.S. at 725, 100 S.Ct. at 2439—a result that "would blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime workers" through this "remedial" legislation enacted "out of solicitude for the workers." *Id.*

The issue in *Sun Ship* related to whether the pre-1972 concurrent state-federal remedy recognized by *Davis* had been diminished by the 1972 amendments. Nevertheless, *Sun Ship's* reasoning, it seems to us, equally applies as to the generically similar issue before us, *i.e.*, whether these same amendments have diminished *Calbeck's* pre-1972 recognition of all work-injuries on navigable waters as being in "maritime employment" for purposes of the Act—an interpretation complementary to the concurrent-remedy interpretation of the Act accorded by *Davis*, equally based upon the identical reasons of effectuating the certain and efficient administration of the compensation remedy afforded by Congress to amphibious workers by the Act.[32]

[32] It is only fair to state that the Second Circuit in its per curiam opinion in *Churchill v. Perini North River Associates*, 652 F.2d at 255 (2d cir. 1981), *cert. granted*, __ U.S. __, 102 S.Ct. 1425, 71 L.Ed.2d 647

We, similarly to *Sun Ship*, can find no legislative intent expressed in the legislative history to override *Calbeck's* interpretation that injuries sustained at work on navigable waters were sustained in "maritime employment" within the meaning of the Act; in fact, the legislative history here indicates the contrary. See II above. We note that attempting to determine case by case whether an on-water injury occurs in an employment with a "realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters," as enunciated by *Weyerhaeuser, supra*, involves the same difficulties and disagreements in determinations (*see, e.g.*, note 28), as did the unworkable case by case determination in the "maritime but local" test of

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(Footnote 32 continued)
(1982), in refusing to recede from *Fusco II*, reached a contrary conclusion:

> While the question is certainly not free from doubt, we decline to read *Sun Ship, Inc.,'s* reaffirmation of *Davis* and *Calbeck* as creating such a dramatic change in the analytical framework set forth in *Ford* less than a year earlier. Indeed, Justice Brennan, writing for the Court in *Sun Ship, Inc.*, stated that "[t]he line that circumscribes the jurisdiction of the LHWCA" is a "compound of 'status' and 'situs'." 447 U.S. at 725, 100 S.Ct. 2439, 65 L.Ed.2d 458. *Sun Ship, Inc.*, held only that nothing in the 1972 Amendments precludes a state from offering compensation to an employee who is admittedly covered under the expanded situs of the Act. The distinct question of *which* employees are covered under the Act is controlled by the analysis set forth in *P. C. Pfeiffer Co. v. Ford, supra*, and applied by this Court in *Fusco II*. *See also Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976). We do not read *Sun Ship, Inc.* as suggesting that the *Ford* analysis should not apply to injuries occurring on the water itself. We therefore adhere to our reasoning in *Fusco II*.

652 F.2d at 258.

whether the employment had a "direct relationship to navigation or commerce," *see Grant Smith-Porter v. Rohde, supra,* that was rejected by *Davis* and *Calbeck*. No more than was the Court in *Sun Ship,* are we willing to believe that in its 1972 remedial revisions the Congress intended—without the slightest sign of any intent to do so—to resurrect the "jurisdictional monstrosity" created by such a test of indeterminate content, terminated fully by the clarifying interpretations of *Davis* (1942) and *Calbeck* (1962).

One final note. We must be mindful that a primary intent of the 1972 amendments was not only remedial as to injured workers, by increasing their benefits and by extending coverage landward. Another principal purpose was to fre maritime employ*ers* of indemnity claims by vessels on which their employees were injured, and thus to assure that an employer's compensation liability under the Act "shall be exclusive and in place of all other liability" for an employment-related injury, section 905(a), 33 U.S.C. § 905(a). See text at notes 9 and 10 above. The express legislative intent was to immunize employers of amphibious workers injured on a vessel from indemnity claims, such as that herein asserted by the vessel-defendant by third party demand against the plaintiff Boudreaux's employer.

If we here determine that Boudreaux was not in "maritime employment" at the time of his injury on navigable waters, his employer is exposed to the vessel's

indemnity action, *see Miller v. Central Dispatch, Inc., supra*, 673 F.2d at 784, despite the undoubted and express intent reflected by the legislative reports and statutory language to exempt all maritime employers from such a claim. The legislative history reveals not the slightest intention other than that this freedom from indemnity claim granted by the 1972 amendments was intended to benefit all employers of amphibious workers injured on vessels, such as Boudreaux's employer in the present instance. To withdraw coverage from Boudreaux and other amphibious workers injured on navigable waters is to expand their employers' exposure to such indemnity claims, as well as to vexatious suits on a case-by-case basis (including those based on unseaworthiness), using indefinite criteria to determine whether the employee's injuries were or were not covered by the Act. As we stated in this context in *Miller, supra*,

> This result would run contrary to the clear Congressional intent under the 1972 amendments to include maritime workers under the Act in exchange for eliminating the right to sue for unseaworthiness. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. at 724, 100 S.Ct. at 2438, 65 L.Ed.2d at 466. The LHWCA is to be liberally construed and in such a way as to avoid the jurisdictional dilemma which existed prior to the 1972 amendments. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. at 719-21, 725-26, 100 S.Ct. at 2436-37, 2439, 65 L.Ed.2d at 462-64, 466-67.

673 F.2d at 784.

VII. *Coverage Afforded Even Under the Weyerhaeuser Test*

We further note that coverage of the Act is here afforded even under the *Weyerhaeuser* test—*i.e.*, that, even though the injury is sustained on the navigable waters, for an injured employee's work-activity to be considered within the coverage of the Act as "maritime employment," the employment activities must have a realistically significant relationship to traditional maritime activity relating to navigation or commerce on navigable waters. This is the conclusion reached by the panel decision herein, 664 F.2d at 464-66 (Part I), relying upon a holding under similar facts in *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981). In both of these decisions, oil-production specialty workers were injured at work on movable drilling barges ("vessels"). The situs test was unquestionably met, and the issue was whether these employees met the status or "maritime employment" test.

The substance of the reasoning in these decisions is set forth at *Pippen*, 661 F.2d at 383-84:

> In the instant case, plaintiff Pippen was a wireline operator. At the time of his injury he was preparing to set packers for perforation. The function of the vessel on which Pippen was working was to drill gas wells; consequently, Pippen's work was essential to the function of the vessel. More importantly, Pippen's job was necessary to the completion of the offshore drilling process. As discussed above, to determine whether the status test is satisfied, it is necessary to examine the

> nature and purpose of the employee's activities and to determine whether those activities had a realistically significant relationship to maritime navigation or commerce. The "significant relationship" requirement can be met when the purpose of the employee's activities is to facilitate maritime commerce. Since offshore drilling—the discovery, recovery, and sale of oil and natural gas from the sea bottom—is maritime commerce, it follows that the purpose of Pippen's work was to facilitate maritime commerce. Since the purpose of Pippen's work was to enable the vessel to perform its designated task—offshore drilling—and since the work was, in addition, directed at facilitating maritime commerce, we are compelled to conclude that the work performed by Pippen had a realistically significant relationship to maritime commerce. Thus, Pippen was engaged in maritime employment at the time of his injury.

Or, as summarized by the panel majority in *Boudreaux*, 664 F.2d at 466:

> The ruling in *Pippen* is dispositive of the present issue. In the case before us, Boudreaux (like Pippen) was injured on navigable waters while performing wirelining employment duties that were an integral or essential contribution to the mineral-production function of the vessel upon which he was working. The work performed thus "has a realistically significant connection to traditional maritime activity", *Pippen, supra*, 661 F.2d at 385, so as to be "maritime employment" within the coverage of the LHWCA.

The jurisprudential expressions upon which these conclusions are reached are fully set forth by the cited opin-

ions. We see no need to reiterate them here. Suffice it to say, they fully support the holdings in these cases that the injured employees involved met the "significant relationship" test of maritime employment enunciated by these decisions, and that therefore their injuries were within the coverage of the Act.

Some suggestion is made that contemporaneous 1972 legislative action (or rather inaction) indicates that Congress did not consider maritime oil-production workers to be covered by the Act, as amended in 1972. Reliance is placed upon Congress's failure, after consideration, to enact the "Tower bill", the "Marine Petroleum Workers' Compensation Act of 1971".[33] However, assuming legislative intent could be deduced from Congress's failure to enact related legislation, no such inference could be drawn here. The Tower bill was intended to extend LHWCA coverage to *all* marine petroleum extractive workers; its primary purpose, however, was to relegate to the LHWCA compensation remedy those oil workers as signed as "members of the crew" to movable barges and thus entitled to the greater damages afforded by the Jones Act, *see Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).[34] As the Senate

[33] *See* proposed "Marine Petroleum Workers' Compensation Act" S. 1547, 92d Cong., *reprinted in* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 2318, S. 525, and S. 1547, 92d Cong., 2d Sess., at 24-27 (1972) (hereinafter cited as "Senate Hearings").

[34] Introductory Statement of Senator John Tower on S. 1547, Marine Petroleum Workers' Compensation Act of 1971, 117 Cong.Rec. 10,490-91 (1971).

committee hearings show, it was conceded by both industry and labor witnesses that non-crew offshore oil workers were then entitled to LHWCA benefits if injured on navigable waters, or on fixed platforms on the outer continental shelf, and the effort of the bill was only to extend a similar coverage to oil-worker "crew" members on movable barges and to deny them the more generous Jones Act seaman remedy.[35] If any inference as to Congressional intent is permissible from the circumstances surrounding non-enactment of the Tower bill, it is that Congress felt that no new legislation was required to afford LHWCA coverage to non-crew oil-workers injured on navigable waters, and that it did not wish to deprive "crew" oil-workers of their more lucrative Jones Act recovery.

Conclusion

For the reasons above stated, we conclude that the 1972 LHWCA amendments did not in any way diminish the traditional coverage of workers injured at work on navigable waters, who under the Act have been and are considered to be in "maritime employment." Even were it required that the duties of a "maritime employee" require a "significant relationship to maritime commerce or navigation", the plaintiff Boudreaux is nevertheless within the coverage of the LHWCA, because persons in the marine petroleum business who work on drilling vessels in navigable waters are engaged in employment significantly

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[35] *See, e.g.*, Senate Hearings, *supra* note 33, at 396, 402, 411, 451-53, 473-76. *See also id.* at 487, 581-90, 602-13 (considered *all* oil-production workers on the water as in "maritime employment."

related to maritime navigation and commerce. Accordingly, we AFFIRM the judgment of the district court, which held that the third-party defendant (Boudreaux's employer) was exempted from indemnifying the vessel party (defendant in Boudreaux's suit, and third-party plaintiffs herein) by statutory provisions according this defense to employers covered by the Act.

AFFIRMED.

GEE, Circuit Judge, with whom GARWOOD, Circuit Judge, joins, dissenting:

At the time of the panel decision in this appeal, December 7, 1981, I prepared and filed a dissent stating at some length why I thought the views expressed in the panel opinion were incorrect. *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 469-80 (5th Cir. 1981). Judge Tate's opinion for the en banc court is sufficiently similar to his for the panel that I see small occasion to repeat here what I said there. Since then, moreover, on February 22, 1982, the Supreme Court granted certiorari in *Churchill v. Perini North River Associates*, 652 F.2d 255 (2d Cir. 1981), *cert. granted sub nom. Director, Office of Workers' Compensation Programs v. Perini North River Associates*, __ U.S. __, 102 S.Ct. 1425, 71 L.Ed.2d 647 (1982). The issue there is the same as here, and since it is now to be decided by the high Court, I see little need for us to debate it further.

Simply stated, it is whether there are to be different "status" requirements for LHWCA coverage according to the "situs" of the injury. As all acknowledge and none disputes, the Supreme Court held, in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979), that after the 1972 revision of the LHWCA a dual test governs coverage: situs (injury on navigable waters or their recently included adjoining areas) *and* status (work in maritime employment). According to the majority opinion above, whenever a worker is injured on navigable waters themselves, both the status and the situs requirements of *Pfeiffer* are ipso facto satisfied. This is to say that any work whatever, no matter how landside in nature, becomes "maritime employment" if performed at a location actually *on* such waters and that the status test of *Pfeiffer* is therefore to be applied to exclude coverage as nonmaritime only on the newly included adjoining areas—piers, wharfs, and so on. Thus by semantic legerdemain the dual test of *Pfeiffer* is effectively cabined in application to the narrow fringe of "adjoining areas" added by the 1972 amendments.

So to hold, in my view, is largely to reverse the principles laid down in *Pfeiffer* by the Supreme Court—a bold stroke indeed. In so holding, we stand alone among the major maritime circuits. But for us, each of these, to one degree of clarity or another, has held that "status" requires for coverage that the work being done at the time of injury be of a nature traditionally maritime and bear some significant relationship to navigation and commerce on

navigable waters.[1]

To me, therefore, the weight of authority—as represented by the opinions of our sister circuits—and the dictates of reasson—as I have sought to show in the panel dissent cited above—are to the contrary of the majority's decision today. I therefore respectfully dissent from it, pretermitting further discussion since the matter will shortly be settled by the Court.

[1] First Circuit: *Graziano v. General Dynamics*, 663 F.2d 340 (1981); Second Circuit: *Churchill v. Perini North River Associates, supra*; Third Circuit: *Dravo v. Banks*, 567 F.2d 593 (1977); Fourth Circuit: *Caldwell v. Ogden*, 618 F.2d 1037 (1980); Ninth Circuit: *Weyerhaeuser v. Gilmore*, 528 F.2d 957, *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976). The Eleventh will be governed, as I understand it, by our "Old Fifth Circuit" decision today unless it affirmatively acts to the contrary.

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NO. 82-605

In the Supreme Court of the United States

OCTOBER TERM, 1982

A.W.I., INC.—Petitioner

VERSUS

AMERICAN INSURANCE CO.—Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Contents i
Table of Authorities ii
Summary of Argument iii
Argument 1
Conclusion 5
Certificate of Service 6

TABLE OF AUTHORITIES

CASES **PAGE**

Boudreaux v. American Workover, Inc.,
5 Cir., 680 F.2d 1034 1

Brown & Root, Inc. v. Joyner,
4 Cir., 607 F.2d 1087, 1090, *certiorari denied*,
446 U.S. 981, 100 S.Ct. 2960, 64 L.Ed.2d 837 4

Caldwell v. Ogden Sea Transp., Inc.,
4 Cir., 618 F.2d 1037 4

Dravo Corp. v. Banks,
3 Cir., 567 F.2d 593 4

Graziano v. General Dynamics Corp.,
1 Cir., 663 F.2d 340 4

LeMelle v. B. F. Diamond Const. Co.,
4 Cir., 674 F.2d 296 4

Rodrigue v. Aetna Casualty and Surety Company,
395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 3

Thibodaux v. Atlantic Richfield Co.,
5 Cir., 580 F.2d 841, *certiorari denied*,
442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 3

STATUTES

43 U.S.C. §1331 et seq. 3

OTHER AUTHORITIES

H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11, reprinted
in [1972] U.S. Code Cong. & Ad. News 4698, 4708;
S. Rep. No. 1125, 92d Cong., 2d Sess. 13 2

H.R. Rep. No. 1441, 92d Cong. 2d Sess. 11, reprinted
in [1972] U.S. Code Cong. & Ad. News 4698,
4707-08 2

SUMMARY OF ARGUMENT

Employment held to be maritime under the Longshoremen and Harbor Workers Compensation Act prior to the 1972 amendments thereof was not stripped of its maritime character by virtue of such amendments; and employees covered by the Act prior to the 1972 amendments and injured over navigable waters are still entitled to the benefits thereof.

NO. 82-605

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

A.W.I., INC.—Petitioner

VERSUS

AMERICAN INSURANCE CO.—Respondent

ON PETITION FOR A WRIT OF CERTIORARI
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ARGUMENT

The majority opinion of the Fifth Circuit on rehearing en banc[1], wherein ten judges joined and two dissented, is an eloquent response to petitioner's petition for writ of certiorari and requires only minimal supplementation.

The statement on page 10 of the petition that "In other references, Congress declared that a person was not intended to be covered simply because he happened to be in

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[1] *Boudreaux v. American Workover, Inc.*, 5 Cir., 680 F.2d 1034.

in a covered area" has reference to the following statements in the Senate and the House reports on the 1972 amendments declaring:

> "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."[2]

What this had related to was the following prior statement in the House Report:

> "The present Act, *insofar as longshoremen and shipbuilders and repairmen are concerned,* covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs."[3]

The reference in the first quotation hereinabove to "employees who are not engaged in loading, unloading, repairing, or building a vessel" is to the employees in the second quotation described as "longshoremen and ship-

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[2] H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11, reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4708; S. Rep. No. 1125, 92d Cong., 2d Sess. 13.

[3] H.R. Rep. No. 1441, 92d Cong. 2d Sess. 11, reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4707-08 (emphasis added).

builders and repairmen". Essentially, what the committee was saying was that as to employees who were injured shoreside and did not fall within the aforementioned employment categories they would not be covered simply because they were injured in an area adjoining navigable waters. The committee certainly was not inferring that employees covered by the act prior to the 1972 amendments and injured over navigable waters should not be covered.

Reliance by petitioner on *Thibodaux v. Atlantic Richfield Co.*, 5 Cir., 580 F.2d 841, certiorari denied, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274, and *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 is clearly misplaced. In holding that the employee in *Thibodaux* was not covered by the LHWCA, the Court stated "The deceased simply is not the amphibious worker sought to be protected by the 1972 amendments to the LHWCA because his work was performed on land", a factor which distinguishes that case and the instant case in that the only connection that the plaintiff in *Thibodaux* had with maritime activities was that he was transported to his place of employment by boat. *Rodrigue* found fixed drilling structures to be "Artificial islands" as though they were federal enclaves in an upland state and held that they were not within admiralty jurisdiction, as a result whereof the Outer Continental Shelf Lands Act[4] was applicable thereto. On the other hand, Boudreaux was injured while working aboard a

[4] 43 U.S.C. §1331 et seq.

workover barge (a vessel) in navigable waters.

The assumption on page 15 of the petition that "in the opinions that have come out of (the First, Third and Fourth Circuits), it appears that their views would be consistent with the position of petitioner here, that is, in each case the dual inquiry would be made, and the fact that an accident occurred over navigable water would not be enough, and of itself, to create coverage under the LHWCA where the type of employment was not maritime in character" is clearly not borne out by the cases cited[5]. All three of these decisions involved accidents that occurred shoreside. Moreover, in *Graziano* the Court distinguished *Dravo Corp.* and held that a shipyard's maintenance-mason's work was maritime employment. Also, in its recent decision in *LeMelle v. B. F. Diamond Const. Co.*, 4 Cir., 674 F.2d 296, the Fourth Circuit has now joined the Fifth Circuit in cases of this character, specifically holding a concrete finisher on the James River bridge, who was injured over water, to be engaged in maritime employment, quoting thusly from its prior decision in *Brown & Root, Inc. v. Joyner*, 4 Cir., 607 F.2d 1087, 1090, certiorari denied, 446 U.S. 981, 100 S.Ct. 2960, 64 L.Ed.2d 837:

> "We are confident that employment held to be traditionally maritime under the former act has not been stripped of its maritime character by the 1972 amendments.

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[5] *Graziano v. General Dynamics Corp.*, 1 Cir., 663 F.2d 340; *Dravo Corp. v. Banks*, 3 Cir., 567 F.2d 593; and *Caldwell v. Ogden Sea Transp., Inc.*, 4 Cir., 618 F.2d 1037.

CONCLUSION

For the foregoing reasons it is suggested that petitioner's application for a writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this _____ day of _____, 1982, served a copy of the foregoing brief on all counsel to this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid.

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GERARD M. DILLON